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97TH CONGRESS
2d Session

SENATE

REPORT
No. 97-670

PRODUCT LIABILITY ACT

REPORT

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2631

TO REGULATE INTERSTATE COMMERCE BY PROVIDING FOR A UNIFORM PRODUCT LIABILITY LAW, AND FOR OTHER PURPOSES

DECEMBER 1 (legislative day, NOVEMBER 30), 1982.—Ordered to be printed

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PRODUCT LIABILITY ACT

DECEMBER 1 (Legislative day, NOVEMBER 30), 1982.—Ordered to be printed

Mr. PACKWOOD, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

[To accompany S. 2631]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2631) to regulate interstate commerce by providing for a uniform product liability law, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill do pass.

PURPOSE OF THE BILL

The bill, S. 2631, as reported, creates uniform standards of product liability law throughout the United States.

Conflicting product liability rules have made it difficult for manufacturers and product sellers to know their obligations. This has created expensive and burdensome legal costs which are passed on to consumers. The product liability problem has created a serious burden on interstate commerce and Federal legislation is needed to address the course of the problem.

S. 2631, as reported, addresses these problems by establishing uniform standards to be applied in all product liability actions. It will provide clear and reasonable guidelines so that parties can identify their rights and obligations.

BACKGROUND AND NEED

INTRODUCTION

In the mid-1970's, product liability was recognized as a serious problem of interstate commerce which, in the view of many businesses and academic observers, had reached "crisis" proportions. This recognition came as a result of an increase in product liability claims and litigation and an increase in product liability insurance premiums.

The Federal Government responded to these concerns in 1976 by creating a Federal Interagency Task Force on Product Liability (hereinafter "Task Force") to examine the product liability problem. The Task Force, chaired by the Department of Commerce, conducted an 18-month study which culminated in a series of reports confirming the legitimacy of the business community's concerns.[1] There was substantial evidence that the cost of product liability insurance had increased dramatically in the early to mid-1970's and evidence that the number of product liability actions had increased.[2]

The Task Force identified the causes of the product liability problem.[3] Of these causes, two principal causes were overly subjective insurance ratemaking procedures and uncertainties in the product liability tort litigation system.

THE INSURANCE RATEMAKING ASPECT OF THE PRODUCT LIABILITY PROBLEM WAS RESOLVED BY THE RISK RETENTION ACT

In 1977, the Task Force identified ratemaking procedures of liability insurers as one principal cause of the product liability problem. The available evidence showed that incurred product liability underwriting losses (including claims paid, loss reserves and loss adjustment expenses) had risen faster than product liability premiums.[4] In the period from 1974 to 1976, insurers responded by increasing product liability rates. Because product liability coverage was almost always sold as part of a comprehensive general liability package, specific data on ratemaking procedures and on profits or losses in the product field were generally unavailable.[5] Thus insurers were forced to base their rate increases on subjective judgments by underwriters rather than on reliable claim statistics. The Task Force concluded that the rate increases, which contributed and brought attention to the product liability problem, were overly subjective.

In 1978, following the Task Force's Final Report, a second Task Force on Product Liability and Accident Compensation was formed at the Department of Commerce. This new Task Force developed an options paper outlining what action, if any, the Federal Government should take to address the causes of the product liability problem.[6] With regard to the insurance ratemaking aspect of the problem, the options paper proposed Federal legislation, now referred to as the "Risk Retention Act," which was subsequently enacted into law during the 97th Congress.[7]

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[1] E.g., final Report of the Task force on Product Liability, 1 vol. (May 1977); Legal Study, 7 vols. (March 1977); Insurance Study, 1 vol. (March 1977); Industry Study, 2 vols. (April 1977).

[2] Final Report of the Task Force on Product Liability at I–26 (May 1977).

[3] Id. at xxxiv-xlvix, I–21 to I–29. In addition to overly-subjective ratemaking practices and uncertainties in the tort-litigation system, the Task Force also identified unsafe manufacturing practices as a cause of the product liability problem.

[4] An independent contractor commissioned by the Task Force concluded that insurers showed substantial underwriting losses on product liability insurance from 1971 to 1974.

[5] The insurance industry now collects much more product liability data as a result of the Insurance Services Office New Commercial Statistical Plan.

The Risk Retention Act resolves the problem of overly subjective rate making procedures by creating two alternatives to the ordinary purchase of product liability insurance. First, the act facilitates the formation of self-insurance cooperatives, known as risk retention groups. Prior to the act, such groups had been extremely difficult to form, because they were subject to conflicting and duplicative regulations among the various states. The second alternative created by the act is the purchasing group. Businesses forming purchasing groups can now bargain collectively for lower commercial liability insurance premiums.

The options of self-insuring or banding together to obtain lower group insurance premiums encourages commercial insurers to offer product liability insurance at competive rates and to set premiums accurately. Along with other competitive factors, these options have resolved the problem of overly subjective insurance ratemaking. Manufacturers at hearings before the Consumer Subcommittee of the Senate Commerce Committee testified that the insurance ratemaking aspect of the product liability problem has been resolved.[8]

S. 2631 WILL ADDRESS THE PROBLEM OF UNCERTAINTIES IN THE PRODUCT LIABILITY TORT LITIGATION SYSTEM

S. 2631 is an effort to resolve the second major underlying cause of the product liability problem—uncertainties in the product liability tort litigation system. Discussed below are: (1) the sources of the uncertainties in the product liability tort litigation system; (2) the reasons states cannot effectively resolve the uncertainties; (3) the need for and benefits of prompt Federal action; and (4) the reasons Federal action will resolve the uncertainties.

1. There are several sources of uncertainty in product liability law.

Product liability law governs private litigation relating to harms caused by products and defines the rules that determine whether a manufacturer or product seller is responsible for the harms. This area of law and the litigation that surrounds it are fraught with uncertainties as a result of three interrelated factors.

First, the incertainty can be traced in part to the evolution of product liability law from contract and tort law theories.[9] A single product liability claim can, in most States, be brought both on tort theories, such as negligence, strict liability, and fraud, and on contract theories, such as breach of warranty. This mixture of legal theories raises questions concerning, for example, the nature of recoverable damages. Further, the mixture creates conceptual problems for the parties and the trier of fact. As one commentary notes, "many of the most difficult products liability issues facing courts today spring from the doctrinal mixture of contract and tort." [10]

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[6] Options Paper on Product Liability, 43 Fed. Reg. 14612 (April 6, 1978).

[7] Public Law No. 97-45, 95 Stat. 949 (1981).

[8] Product Liability Reform: Hearings on S. 2631 Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation, Serial No. 97-109, 97th Cong., 2d Sess. 14, 107, 115, 116-17 (1982).

[9] E.g., Prosser, Wade & Schwartz, "Cases and Materials on Torts" at 743 (7th ed. 1982) ("The action . . . for breach of warranty is a freak hybrid, 'born of the illicit intercourse of tort and contract,' and partaking the characteristics of both."); Keeton, Owen, & Montgomery, "Products Liability and Safety: Cases and Materials" at 18 ("[Products liability] is a mixture of tort law . . . and the contract law of sales . . .").

Second, there are uncertainties inherent in the fact that product liability law is primarily common law.[11] Because product liability rules are developed almost exclusively by judges in State courts, the rules may vary from State to State and even within one State. Because the rules are judicially developed, they usually are applied retroactively to the case before the court. All of this creates great uncertainty as to the applicable legal rules. Decisions on virtually every aspect of product liability law illustrate great variations among the States and constant changes in legal rules within a State.

For example, traditional law prohibits the plaintiff from using evidence of the defendant's new product safety improvements to show that older products are unsafe. This rule has been abandoned in a few States.[12] As a result, manufacturers are uncertain about whether to undertake product improvements and, thereby, expose themselves to potential challenges. Similarly, product liability tort law traditionally deals with injuries to persons and damage to property. Pure commercial losses or harms are left to commercial law. This principle has been eroded in some States with concomitant confusions for all concerned.[13]

Even basic issues of product liability law, such as the standard for determining when a manufacturer is responsible for harm caused by a defectively designed product, have multiple variations in State law.[14] For example, depending on which State law applies, a product may be defective in design if; (1) if fails to perform as safely as an ordinary consumer would expect when used in a reasonably foreseeable manner, or the defendant fails to prove that the benefits of the product outweigh its risks; [15] (2) it is unreasonably dangerous taking into consideration the utility of the product and the risk involved in its use; [16] (3) it would not have been put into commerce by a reasonable person aware of the harmful nature of the product; [17] or (4) it left the supplier's control lacking any element to make it safe for intended uses or possessing any feature that renders it unsafe for intended uses.[18] Some States require proof that the design defect rendered the product "unreasonably dangerous," while others do not.[19] A manufacturer seeking to avoid design defect liability faces the difficult task of meeting the design standard in each State in which it does business.

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[10] Owen, Keeton, & Montgomery, supra note 9, at 19.

[11] Some states have codified specific issues of product liability law. While this eliminates some uncertainty about the law within the state, it does not resolve the problems of uncertainty facing those who do business on an interstate basis.

[12] *Compare Knight* v. *Otis Elevator Co.*, 596 F. 2d 84 (3d Cir. 1979) *with Abel* v. *J.C. Penney Co.*, 488 F. Supp. 891 (D. Minn. 1980); *Schuldies* v. *Service Machine Co.*, 448 F. Supp. 1196 (E.D. Wis. 1978).

[13] *Compare Schiavone Constr. Co.* v. *Elgood Mayo Corp.*, 439 N.Y.S.2d 933 (App. Div. 1981) *and Berg* v. *General Motors Corp.*, 555 P.2d 818 (Wash. 1976) with *Jones & Laughlin Steel Corp.* v. *Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980).

[14] See generally, Hearings on S. 2631, supra note 8, at 94–95 (statement of James B. Sales, Esq.) and 276–80 (statement of Charles Babcock, Esq., on behalf of National Association of Manufacturers).

[15] E.g., *Catepillar Tractor Co.* v. *Beck*, 624 P.2d 790 (Alaska (1981); *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

[16] E.g., *Turner* v. *General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

[17] E.g., *Wilson* v. *Piper Aircraft Corp.*, 577 P.2d 1322 (Or. 1978); *Phillips* v. *Kimwood Machine Co.*, 525 P.2d 1033 (Or. 1974).

The variations among the States on these and almost all other aspects of product liability law create uncertainty within the tort litigation system. Manufacturers who do business on an interstate basis in a national marketplace are unable to predict which of the multiple legal standards will apply to them or whether a particular standard will remain constant. This uncertainty is exacerbated because the legal standards are often incomprehensible and may be modified at any time by a court.

Third, the uncertainties in the product liability tort litigation system are attributable to conflicting philosophies about tort law. Those conflicting philosophies are best illustrated by the divergent approaches to strict liability. Although negligence or fault-based principles have been the traditional basis for recovery in any tort action, strict liability has also been recognized as a basis for recovery to one degree or another in most states. One approach to strict liability limits it to situations where it can be justified by traditional tort law concepts. A conflicting philosophical approach extends strict liability beyond these traditional limits.

The traditional view of strict liability limits the theory to manufacturing or construction defect cases and to breach of express warranty cases.[20] This limit recognizes that manufacturers and product sellers are not accident insurers and, therefore, should not automatically pay for every product-related harm. Strict liability is justified in construction defect cases, where a product fails to conform to the standards established by the manufacturer. It is reasonable for consumers to expect that the product will conform to the manufacturer's own standards. A jury can readily determine if the product was mismanufactured by making an objective comparison of the mismanufactured product with the product the manufacturer intended to make. These points justify strict liability in the area of manufacturing defects. Likewise, strict liability in express warranty cases in also consistent with traditional tort law concepts. The manufacturer should be held responsible for harms caused by its failure to meet its own representations.

These traditional justifications for strict liability are not present in design and warning defect cases. There is no objective measure for determining if a defect exists. In a design or warning case, the allegation is that the chosen design or warning was defective, rendering all products incorporating or using that design or warning defective. If strict liability is applied in these cases, the manufacturer could be responsible for product harms regardless of its care in designing or warning about the product. Recognizing that manufacturers are not insurers of their products, traditional tort law states that liability should depend on whether the manufacturer acted unreasonably in choosing the design or warning that the claimant alleges caused the harm.

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[18] E.g., *Azzarello* v. *Black Bros. Co.*, 480 Pa. 547, 391 A.2d 1020 (1978).

[19] *Compare Eickelberg* v. *Deere & Co.*, 276 N.W.2d 442 (Iowa 1979) *with Cronin* v. *J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972).

[20] Wade, "On Product 'Design Defects' and their Actionability," 33 Vand L. Rev. 551 (1980).

Some courts have adopted a conflicting philosophy of strict liability that expands the theory beyond situations where it is justified by traditional tort law concepts. The rationale in these courts is based on socio-economic policy. Because manufacturers and product sellers are assumed to be in a better position than claimants to pay and distribute the risks of liability, they should be liable. This approach to strict liabiliby, in effect, makes manufacturers accident insurers. Damages for harms caused by a product are paid not because of wrongful or negligent conduct by defendants, but because of a social policy judgment about which party should bear the loss.

The philosophical differences in the two approaches to strict liability create conflicts which pervade product liability law and, in fact, may even be at odds in a single decision. As a result, the standards of responsibility in product cases are blurred and confused.

In sum, a mixture of legal theories, a wide and ever-changing set of common law rules, and fundamental differences about the underlying bases of tort law itself cause uncertainties in product liability law. As a result, the legal standards applicable to a product liability claim are uncertain and unpredictable.

2. States cannot effectively resolve the uncertainties

After the causes of the product liability problem were identified, the Task Force issued an options paper in 1978 which suggested that a model product liability act be drafted with the idea that uniform standards of responsibility would be enacted at the Federal level.[21] A model law was drafted and over 1500 pages of public comment were received. A final version of the model law, known as the Uniform Product Liability Act (UPLA), was published on October 31, 1979.[22]

UPLA, ultimately offered as a model State law, has not been adopted in full in any State. While over 30 States do have some form of product liability statute, they have not resolved the uncertainties in the product liability tort litigation system for several reasons. Most are not comprehensive and fail to address the key issues that arise in product liability litigation. Further, no two State statutes are alike. Even if an individual State adopted a comprehensive product liability statute so that its own law was clear and predictable, the legal rules would still vary from State to State.

Individual States cannot address the uncertainties of product liability law effectively, because certainty within one State does little to resolve the tort litigation problems facing those who deal in an interstate market. Products are manufactured, sold, used, and insured on a nationwide basis. Data show that most products manufactured in a given State are consumed or used outside that State.[23] As a result, manufacturers and product sellers may be involved in product liability actions governed by the law of any State in which they do business. An attempt by one State to resolve the uncertainties in the tort-litigation system is not effective.[24]

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[21] 43 Fed. Reg. 14612 (April 6, 1978).

[22] 44 Fed. Reg. 62714 (October 31, 1979).

[23] *See* Hearings on S. 2631, supra note 8, at 248.

Experience with the State approach and the realities of the marketplace demonstrate that the individual States cannot resolve the uncertainties in the product liability tort-litigation system. The Committee believes that Federal action is necessary.

3. There is a need for Federal action to resolve uncertainties in product liability law

Uncertainties in the product liability tort-litigation system have a serious impact on interstate commerce and, ultimately, an adverse effect on the economy and society generally. A comprehensive Federal law, such as S. 2631, would establish uniform standards for all product liability claims and would eliminate much of the uncertainty and reduce the associated adverse effects of those uncertainties.

a. Litigation and transaction costs

Uncertainty about the law of product liability increases the costs of litigating a claim. Time and effort must be expended by all parties to determine what the applicable legal rules are. Further, the possibility that a court may adopt a new legal standard in a given case gives the parties the incentive to argue for adoption of a new standard which would aid their case. Parties may have to brief and rebrief the same legal arguments repeatedly. Because the law is unclear and because, even if it is clear, may change, parties have great difficulty evaluating the merits of their case. As a result, it is difficult to come to a rational settlement decision. Parties therefore incur the costs of litigating claims which could have been settled to the satisfaction of all involved.

The litigation and associated transaction costs involved in investigating, pursuing, and defending a claim are a drain on productivity for manufacturers and product sellers. Legal costs are generally passed on to consumers in the form of higher product prices. These costs are by no means insignificant. According to calculations derived from a 1977 survey conducted by the Insurance Service Office, for every dollar paid to claimants, insurers paid an average of 42 cents in defense costs.[25] And for every dollar awarded to a claimant, he or she pays an average contingent fee of 33 cents in legal costs and therefore receives about 67 cents Thus, one can estimate (adding the average defense cost to the contingent fee) that the product liability tort litigation system appears to cost more in litigation and transaction costs than the net recovery received by the claimant.

The testimony of a press brake manufacturer illustrates the magnitude of these legal and transaction costs:

During the most recent fiscal year, our small company and its insurers paid out $850,000 for product liability claims. But only 18 percent of that amount went to pay settlements to claimants. About $700,000 went for defense lawyers and other transaction costs.

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[24] Several State Governors have recognized this in vetoing proposed product liability legislation.

[25] Insurance Services Office Product Liability Closed Claim Survey, A Technical Analysis of Survey Results at 11 (1977).

I firmly believe that a uniform set of balanced product liability rules would have saved our company and its insurers over 60 percent of the $700,000 we have expended. I also estimate that about $100,000 of the above would result in savings because of uniformity, thus eliminating the current need for our attorneys to research and brief conflicting laws in 50 States in an effort to persuade courts to change or sustain particular rules of law.

Second, many transaction costs will be eliminated, if the law is made more balanced and predictable. If everyone concerned—claimants, defendants, lawyers, judges, and manufacturers—know what the rules are, many claims without merit will never be started. Over the years we have lost only four verdicts out of the many claims that we have defended.

We average over $30,000 in defense costs on claims that proceed through trial. But we average about $5,000 in investigating and defending each claim we receive, regardless of the eventual disposition. We settle many of these claims for relatively small amounts of money, because it costs less to settle them than it does to defend them in court. If claimants and their lawyers knew in advance that they would be required to prove fault in design and warning defect cases—and if there were a reasonable period of repose for overage products—most of these claims would never be filed.[26]

S. 2631 will benefit all parties and the economy by reducing unnecessary litigation and transaction costs. This will be achieved through the enactment of clear uniform legal standards and through a clarification of specific aspects of product liability law.

b. Insurance costs

Although the Risk Retention Act has eliminated subjective insurance votemaking, the current uncertainties in the product liability tort litigation system contribute to the costs of product liability insurance Insurance rates reflect the fact that manufacturers and product sellers are unable to predict the legal standards which will apply in future claims against them and the fact that the uncertainties create litigation and transaction costs. These insurance costs are passed on to consumers in the form of higher product prices. Enactment of uniform Federal product liability standards will, in the Committee's judgment, stabilize product liability insurance costs, primarily due to the reduction in litigation and transaction costs.

c. Production costs

Uncertainties in the product liability litigation system have an adverse impact on productivity. This is manifested in several ways.

First, legal expenses involved in keeping abreast of variations and changes in the law, not to mention investigating and litigating a claim, divert resources from productive efforts. Similarly, excessive management time is diverted from production to the assessment of legal claims.

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[26] Hearing on S. 2631, supra note 8, at 102 (statement of Emmett McCarthy, Vice President, Product Reliability, Dreis & Krump Manufacturing Company).

Second, uncertainties and variations in product liability tort law may deter the development of new products or product improvements. For example, manufacturers have justification for believing that evidence of product improvements may be used against them as evidence that an older product is defective. The result is clearly not in the best interests of the consumer.

Finally, businesses may eliminate a particular product line or terminate operations altogether if the costs of product liability exposure become too burdensome. As a representative of the Sporting Goods Manufacturers Association testified:

> Out of the 13 football helmet manufacturers, 7 remain in business. . . . At present, the risk of doing business, precludes being in business. . . . Finally, Mr. Chairman, because of the fear of unwarranted product liability suits, liability insurance costs, and the economy's inflationary pressures, small and medium-sized businesses are hesitant to invest in new product research and development.[27]

Enactment of uniform Federal standards applicable in all product liability cases will relieve some of these drains on productivity and the concomitant adverse affects on the economy.

d. International trade

Uncertainties in the product liability tort litigation system have an adverse effect on international trade, a fact which affects the economy generally.

American manufacturers and product sellers generally pay product liability insurance rates which are 20 times higher than those in Europe.[28] This disparity is attributable in large part to the uncertainties in the American tort litigation system.[29] As a result of the disparity, American manufacturers and product sellers may be at a competitive disadvantage in both foreign and domestic markets. Insurers generally do not discount premiums where a manufacturer exports its goods, because there is always the possibility that a product-related suit will be brought in the United States. Thus, each U.S. product shipped abroad contains an insurance cost element greater than that of foreign competitor.[30] Domestically, the effect of the current uncertainties in product liability law is similar. The price of imported products can be lower, because product liability insurance rates for those products are lower.[31]

Enactment of uniform Federal Standards relating to product liability law will improve the competitive position of American business at home and abroad.

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[27] Hearings on S. 2631, supra note 8, at 2–3 (statement of Maria Dennison, Director of Washington Operations, Sporting Goods Manufacturers Association).

[28] See T. Marriott, "Product Liability and International Trade," *Product Liability & Tort Law Reform*, National Legal Center For The Public Interest, at A–128 (April 21, 1982).

[29] *Id.*

[30] See F. Orban, "Product Liability and International Trade and Policies," (Product Liability and Tort Law Reform," National Legal Center For The Public Interest, at 144 (April 21, 1982).

[31] See letter from James H. Mack, Public Affairs Director, National Machine Tool Builders Ass'n, to Jim J. Tozzi, Deputy Director of Information and Regulatory Affairs, Office of Management and Budget (June 10, 1982).

4. *A Federal product liability law will resolve the uncertainties*

The current climate of uncertainty in product liability law imposes serious burdens on interstate commerce.

A Federal product liability law will reduce these burdens by achieving uniformity, because it will be applied by all courts in all product liability actions.

The enactment of this kind of law is within Congress' power to regulate interstate commerce.[32] There are numerous examples of Federal legislation in areas where diverse State laws were deemed a burden on interstate commerce.[33] The fact that product liability law is traditionally an area of state law does not alter the fact that Federal legislation in this area, under the Supremacy Clause, can prexempt state law.[34]

Just as the Federal Employers' Liability Act [35] achieved certainty and uniformity through Federal tort law rules for railroad employees injured in interstate commerce, so will S. 2631 achieve uniformity and certainty in product liability tort litigation.

LEGISLATIVE HISTORY

This proposal has had a long and careful history, beginning with the development of a model Uniform Product Liability Act by the Department of Commerce in 1975. That model act was developed with substantial input from the public. Then, in the 96th Congress extensive hearings here held in the House on the topic of product liability. Out of those hearings evolved H.R. 7921, in the second session, which was a Federal Uniform Product Liability act. In April 1981, Senator Kasten asked the staff of the Consumer Subcommittee to begin with H.R. 7921 and prepare a staff draft for consideration by the Commerce Committee. That draft was issued for public comment on October 15, 1981. The Committee received over 2,000 pages of public comment made substantial revisions in the draft, taking into consideration concerns of both consumers, manufacturers and product sellers. In March 1982 prior to the introduction of S. 2631, the subcommittee held 2 days of intensive hearings on the need to reform product liability law. Then, after the introduction of S. 2631 by Senator Kasten on June 16, 1982, the subcommittee held 2 days of additional hearings on the bill. The subcommittee heard testimony from a number of organizations and businesses, including the Product Liability Alliance, the National Association of Wholesaler-Distributors, the National Association of Manufacturers, the National Machine Tool Builders Association, the Association of Trial Lawyers of America, the Consumer Federation of America, the National Consumers League, Public Citizen Congress Watch, and from legal scholars, small and medium size businesses and their associations.

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[32] U.S. Const., Art. I, § 8, cl. 3.

[33] E.g., Public Utility Holding Company Act, 15 U.S.C. §§ 79a et seq. (1976) (activities involved "not susceptible of effective control by any state"); Cotton Standards Act, 7 U.S.C. §§ 51 et seq. (1976) (uniform national classifications necessary to protect and promote commerce); Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 et seq. (1976) (national standards essential in order that "commerce and the national economy . . . [not be] impeded by diverse, nonuniform . . . regulations").

[34] U.S. Const., Art. VI, cl. 2.

[35] 45 U.S.C. §§ 51 et seq. (1976).

On July 15, 1982 the administration endorsed the concept of Federal legislation providing uniform product liability standards. On September 9, 1982, after consideration by the Cabinet Council on Commerce and Trade, the administration expressed its support for the bill and "urge[d] prompt consideration of S. 2631 by the full Committee."[36]

COMMITTEE ACTION

On October 1, 1982, the Committee adopted S. 2631 with an amendment in the nature of a substitute and ordered the bill, as amended, favorably reported by voice vote.

SUMMARY OF BILL

RESPONSIBILITY OF MANUFACTURERS

In any product liability action, a manufacturer is liable if the claimant establishes by a preponderance of the evidence that the product is unreasonably unsafe in construction, in design, because of a failure to provide adequate warnings or instructions, or because the product did not conform to an express warranty.

A product may be unsafe in construction if it deviated from the manufacturer's design or performance specifications or from otherwise identical units of the same product line. A manufacturer is, then, strictly liable if the deviation in the product caused the claimant's harm.

A product may be unreasonably unsafe in design if a reasonably prudent manufacturer would not have used the design. A claimant must show that the manufacturer knew or should have known about the danger which caused the claimant's harm and that there was a means to eliminate that danger. Where an alternative design is offered as part of the claimant's case, it must be one about which the manufacturer knew or should have known and one which used technology which was reasonably accepted in the scientific, technical or medical community. Manufacturers are not liable for unavoidably dangerous aspects of a product or for unsafe aspects which a reasonably prudent person would recognize as generally characteristic of the product.

A product may be unreasonably unsafe because of a failure to provide adequate warnings or instructions if (1) the manufacturer knew, or should have known, of the existence of the danger which caused the claimant's harm, (2) a reasonably prudent manufacturer would have provided the warnings or instructions which the claimant alleges would have been adequate, (3) the manufacturer did not provide such warnings or instructions, and (4) the warnings or instructions would have prevented harm to a reasonably prudent product user. In addition, the manufacturer may be responsible for failure to warn if, after the product was made, the manufacturer discovered or should have discovered the danger which caused the claimant's harm and failed to provide post-manufacturer warnings to the claimant as a reasonably prudent manufacturer would have done.

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[36] See letter from Secretary of Commerce Malcolm Baldridge to Senator Robert W. Kasten, Jr., September 9, 1982.

Warnings or instructions must be given to a product user unless they were provided to certain classes of persons who could be expected to pass the warning on to the users. A manufacturer is not liable for failure to warn about obvious dangers, consequences of misuse, alteration or modification.

A manufacturer is strictly liable for breach of express product warranties where the claimant reasonably relied on the warranty and the breach thereof caused the claimant's harm.

RESPONSIBILITY OF PRODUCT SELLERS

A product seller is liable if, by a preponderance of the evidence, the seller's own lack of reasonable care in handling the product or the seller's own breach of an express product warranty was a proximate cause of claimant's harm. Thus, the seller is responsible only for his own fault. Where, however, the manufacturer is not subject to service of process or is determined to be judgment-proof, the seller may be responsible for harms attributable to the manufacturer.

COMPARATIVE RESPONSIBILITY AND EFFECT ON WORKERS' COMPENSATION BENEFITS

Comparative responsibility of third parties and of the claimant does not bar recovery, but reduces compensatory damages awarded to the claimant by an amount proportionate to the claimant's responsibility.

If a manufacturer or product seller establishes by a preponderance of the evidence that misuse or alteration of a product caused the claimant's harm, damages shall be reduced or apportioned to the extent that the misuse or alteration was a cause of the harm.

Damages shall also be reduced by the amount paid to the claimant under any state or federal workers' compensation law and the present value of any such benefits to which the claimant would be entitled in the future. Unless the product seller has expressly agreed to indemnify an employer, the employer would have no right of subrogation, contribution, indemnity or lien against the seller, and the workers' compensation insurance carrier of the employer would have no right of subrogation against the product seller.

TIME LIMITATION ON LIABILITY

If a product is a capital good, no claim alleging unsafe design or failure to warn in a product liability action may be brought for harm caused by the product more than 25 years after delivery to the first buyer or lessee not engaged in the business of selling and leasing the product or using the product as a component in the manufacture of another product. Capital good is defined as a product used in trade or business or held for the production of income.

This limitation on liability is not applicable if (1) the claimant's harm was caused by the cumulative effect of prolonged exposure to the product; or (2) the harm did not manifest itself until after the time limitation. Thus, claims for certain harms, such as harms from drugs, which do not manifest themselves until many years after product use, would not be barred by this section.

PUNITIVE DAMAGES

Punitive damages may be awarded to any claimant who receives compensatory damages and who establishes by clear and convincing evidence that the harm suffered was the result for the safety of product users.

Following a determination by the trier of fact that punitive damages should be awarded, the judge would determine the amount of damages.

SUBSEQUENT REMEDIAL MEASURES

Evidence of corrective measures taken by a manufacturer or product seller after a harm has occurred would not be admissible in court to prove liability. This preserves the incentive for manufacturers and product sellers to improve their products.

OTHER PRODUCT LIABILITY ISSUES CONSIDERED

In developing the act, the Committee received testimony regarding three major product liability issues that are not addressed in the act as it was finally reported. The Committee believes that these issues merit discussion and that they merit further study. Each issue is discussed below.

Compliance with Government contract specifications

The Committee considered a provision regarding the effect of compliance with government contract specifications on a manufacturer's liability for harms caused by a product. Basically, such a provision would create a defense for manufacturers who comply with Government specifications. The defense would prevent a manufacturer from being held responsible in a design or warning defect case if the aspect of the product which caused harm met the design and warning requirements specified in a Government contract.

The Committee heard testimony supporting such a provision from several witnesses. They expressed the view that it is unfair to impose liability on manufacturers who play no role in developing government specifications but who nevertheless are obliged to meet those specifications in order to fulfill the terms of government contracts. Others expressed a different concern, however, that any defense for compliance with government specifications might inappropriately insulate manufacturers from liability in instances where they did, in fact, take part in product design and development. As a consequence, the Committee decided the Government contracts issue requires further study.

Compliance with Government safety standards

The Committee also considered provisions regarding the effect of compliance with government standards on the liability of manufacturers or product sellers from harm caused by a product. These provisions would have accorded either conclusive or presumptive weight to defendants' compliance with relevant government safety standards. If the weight were conclusive, then a product in compliance with safety standards could not be found unreasonably dangerous. If the weight were presumptive, then a product in compliance with standards could be found unreasonably dangerous only if the claimant offers clear and convincing evidence that (1) the product was unreasonably unsafe and (2) a safer design was technologically feasible and would have complied with all mandatory government safety standards.

Many witnesses stated their view that either conclusive or presumptive weight should attach to compliance with government standards. To support this position, proponents explained that government standards are often the result of a rigorous process in which safe product performance is of paramount importance. Juries, these witnesses believe, lack the technical expertise and information of agency personnel and are therefore ill-equipped to substitute their judgment for that of the relevant Government agency.

Other witnesses presented a different view, stating that government standards are often intended to be minimum standards and, in addition, sometimes fail to keep abreast of industry developments. Opponents of the defense also believe that government standards already receive substantial weight from juries when that weight is warranted. In light of these contrasting views, the Committee decided that the Government standards issue merits further analysis.

Expert opinion

The Committee considered a provision concerning the effect of export testimony. The provision would ve required that a claimant's expert testimony be corroborated by sound objective evidence. Without that supporting evidence, expert testimony, standing alone, would not be sufficient to establish a fact or support a product liability claim.

In testimony and comments to the Committee, many expressed their view that expert testimony which is uncorroborated by sound objective evidence should not, by itself, be sufficient to establish a product liability claim. Proponents of this view believe that these claims should be disposed of as early as possible in a legal proceeding. The Committee heard other testimony, however, that sufficient safeguards already exist with respect to expert testimony: judges must assess experts' qualifications prior to their testimony and instruct juries on how the ultimate issues of liability relate to the expert opinion evidence offered during trials.

After consideration of the expert opinion proposal the Committee believes that it demands additional study before any legislative remedy may be fashioned.

ESTIMATED COSTS

The cost impacts of the bill are summarized in the Congressional Budget Office cost estimate below, submitted in accordance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974. The Committee believes that the cost estimate should be viewed in the following context.

Section 11(b) of the bill would prohibit any "employer" (or its workers' compensation insurer, if any) from pursuing a subrogation or other action against a manufacturer or product seller to recover the workers' compensation benefits paid to the employer's injured worker. The term "employer" would include the Federal Government.

Thus, the Federal Government's workers' compensation program, the Federal Employees Compensation Act (FECA), would be prohibited from seeking to recover FECA benefits paid to a Government employee injured in a product-related workplace accident. However, the Federal Government could continue to seek subrogation recoveries in workplace accidents in which no product was involved. For example, if a postal worker were injured in an automobile accident or bitten by a homeowner's dog in the course of his delivery rounds, FECA could seek to recover the benefits paid to the injured worker from the insurer of the non-government vehicle or the homeowner's liability insurer.

In fiscal year 1982, FECA paid $905,232,571 in benefits to Federal workers for job-related injuries and illnesses. Of this amount, FECA recovered approximately $22 million, or 2 percent of its total claims payments, in subrogation actions against third parties responsible for the Government workers' injuries or diseases. Of this amount, $4.5 million, or ½ of 1 percent of total FECA claims payments, was recovered from the manufacturers or sellers of products involved in the workers' illnesses or diseases.

Thus, the bill would deprive FECA of only ⅕ of its current level of subrogation recoveries ($4.5 million out of $22 million), those involving product-related workplace accidents.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., November 29, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science and Transportation,
U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 2631, the Product Liability Act.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE—NOVEMBER 29, 1982

1. Bill number: S. 2631.
2. Bill title: Product Liability Act.
3. Bill status: As ordered reported by the Senate Committee on Commerce, Science and Transportation, October 1, 1982.

4. Bill purpose: S. 2631 would preempt many state laws regarding product liability by establishing uniform product liability standards. The bill also defines the responsibilities of manufacturers and product sellers, and establishes the legal framework for resolving potential violations.

5. Cost estimate:

[By fiscal years, in millions of dollars]

	1983	1984	1985	1986	1987
Estimated budget authority	3.4	4.5	4.5	4.5	4.5
Estimated outlays	3.4	4.5	4.5	4.5	4.5

The costs of this bill fall within various budget functions.

6. Basis of estimate: This bill would terminate an injured federal employee's obligation to sue in third party product liability injury claims, thus generating a cost to the federal government. Under current law, if a federal worker is injured in a work related accident in which there is a third party product liability, that worker is obligated to sue the responsible third party for injury related damages as a condition for Federal Employee Compensation Act (FECA) benefit receipt. Upon recovery of any damages through litigation, the injured individual then must reimburse the FECA program for benefits received. In most cases, by the time any damages have been recovered, the federal agency for which the injured individual worked has reimbursed the FECA program for the payment of benefits Such damages remitted to FECA are credited to the federal agency's account, offsetting that agency's future obligations to FECA.

A Labor Department review of fiscal year 1982 FECA claims showed that $4.5 million were recovered through third party product liability litigation brought by injured federal workers. It is assumed that this is the amount which would be lost to the federal government through the termination of the responsibility to bring suit in such cases. Because the recovery of such damages directly offset FECA obligations, their loss would result in an increase in budget authority and outlays.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Mary Maginniss, Dick Hendrix.

10. Estimate approved by:

James L. Blum,
Assistant Director for Budget Analysis.

Regulatory Impact Statement

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation.

The purpose of S. 2631, as reported, is to create uniformity and certainty in product liability law, an area of the law that is currently a source of major confusion for all of the parties subject to it. The legislation accomplishes its goal of providing uniformity and certainty by creating clear and consistent product liability standards for state courts to apply in major areas of the law.

S. 2631 creates no new regulations and imposes no additional regulatory requirements at either the state or the federal level. Nor will the legislation change the jurisdiction of State or Federal courts.

While S. 2631 will avoid adding any regulatory burdens to the product liability system, it will result in substantial cost and paperwork savings to all the parties affected by product liability lawsuits. First, the legislation will clarify a confusing area of the law. It will therefore save time and money for manufacturers, product sellers and consumers alike, each of whom will be able to determine their rights more readily than under current law. As a consequence, parties will be able to come to a greater number of pretrial settlements, thus reducing the number and length of product liability trials and the burden they impose on the state court system. Second, by providing uniform standards of liability, S. 2631 will reduce planning and related legal costs for manufacturers who sell their products in a nationwide market. Because the legislation will create one standard to govern product design and warning cases, for example, nationwide manufacturers will no longer be forced to examine conflicting legal decisions in different product markets.

Thus, the Committee believes that S. 2631 will bring about significant cost savings without imposing additional regulatory requirements. The Committee does not believe that the reported bill will have an impact on the privacy of individuals or businesses.

Section-by-Section Analysis

SECTION 1.—TITLE

As reported

Section 1 is the "short title" provision, stating that the act may be cited as the "Product Liability Act."

SECTION 2.—DEFINITIONS

1. In general

Section 2 defines 14 terms of phrases used in the act. The Committee intends that wherever a defined term or phrase is used, reference should be made to the definition in section 2.

2. As reported

(1) *Claimant.*—As used in the act, a "claimant" is any person who brings a product liability action, including the claimant's decedent if the action is brought through or on behalf of an estate. If a product liability action is brought through or on behalf of a minor, "claimant" includes the minor's parent or guardian. Following majority case law, this definition permits nonusers to bring product liability claims.

(2) *Clear and convincing evidence.*—The act adopts the generally accepted definition of clear and convincing evidence.[37] this is a degree of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegation sought to be established. The clear and convincing evidence standard requires more proof than the preponderance of the evidence standard, but less proof than the beyond a reasonable doubt standard.

(3) *Commerce.*—This definition covers the full extent of the Congress' powers to regulate and promote interstate commerce.[38]

(4) *Express warranty.*—This definition is similar to the definition of express warranty used in the Uniform Commercial Code.[39] It includes any affirmation of fact, promise, or description relating to the product. A manufacturer or product seller may give an express warranty orally, in writing, or through any other action intended as a communication.[40]

(5) *Harm.*—Harm for which damages are recoverable under the act includes: (1) damage to property other than the product itself; (2) physical illness, injury, or death of the claimant; and (3) mental anguish or emotional harm of the claimant which accompanies the claimant's physical illness or injury.[41] This statement of what constitutes a compensable loss under the act will avoid claims for harms unaccompanied by a physical illness or injury.

Harm does not include commercial loss. Therefore, damage to the product itself is not a compensable harm under the act. Such direct economic damage has traditionally been left to commercial or contract law, under which a purchaser has a right of action for out-of-pocket losses relating to the value of a product.[42]

Nor are consequential or indirect economic losses, such as loss of profit due to an inability to use the defective product, compensable harms under the act. The case law almost uniformly follows *Seely* v. *White Motor Co.*[43] which leaves recovery for such losses to commercial law and the Uniform Commercial Code. These losses are in essence contract, not tort damages. They arise in the course of commercial dealings and can be resolved through contracts and claims based on those contracts.[44]

(6) *Manufacturer.*—A manufacturer is any person engaged in a business to design or formulate and to produce, create, make, or construct a product or component part of a product. A product seller, wholesaler, distributor, or retailer is a manufacturer in one

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[37] See *Hobson* v. *Eaton*, 399 F.2d 781 (6th Cir. 1968), cert. denied, 394 U.S. 928 (1969). See also 30 Am. Jur. 2d "Evidence" § 1167 (1967).

[38] See *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

[39] See U.C.C. § 2-313 (1977).

[40] E.g., *Drayton* v. *Jiffee Chemical Corp.*, 591 F.2d 352 (6th Cir. 1,978) (breach of express warranty given through advertisements); *Cantrell* v. *Amarillo Hardware Co.*, 226 Kan. 681, 602 P.2d 1326 (1979) (product cover contained express warranty).

[41] E.g., *Payton* v. *Abbott Labs*, 386 Mass. 540, 437 N.E.2d 171 (1982) (to recover for negligently inflicted emotional harm claimants must prove that the emotional harm was caused by physical harm).

[42] See *Baltimore Football Club, Inc.* v. *Lockheed Corp.*, 525 F. Supp. 1206 (N.D. Ga. 1981); *Moorman Mfg. Co.* v. *National Tank Co.*, 91 Ill.2d 69, 435 N.E.2d 443 (1982); *Superwood Corp.* v. *Siempelkamp Corp.*, 311 N.W.2d 159 (Minn. 1981).

[43] 63 Cal.2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965). See also *Jones & Laughlin Steel Corp.* v. *Johns-Manville Sales Corp.*, 626 F.2d 280 (3d Cir. 1980).

[44] Parties who are not in a direct contractual relationship with a product seller or manufacturer may protect themselves through insurance against potential business losses which may arise because a product fails to perform. *See* Note, "Economic Loss in Products Liability Jurisprudence," 66 Colum. L. Rev. 917 (1966).

of two situations. First, it is a manufacturer of a product to the extent it designs or formulates and produces, creates, makes, or constructs the product prior to selling the product. A product seller who engages in such activity does not become a manufacturer of the whole product, but is a manufacturer as to the aspect of the product that it produced, made, or constructed.

Second, a product seller is a manufacturer if it holds itself out to the product user as a manufacturer. This definition, following the *Restatement (Second) of Torts,* includes a seller who uses its own private label on products made by another.[45] Where a product seller has held itself out to a product user as the product manufacturer, the product seller's name and reputation could be relied on as a representation of the product's quality of manufacturing and design. The product seller should be held to that representation.

(7) *Person.*—The act embraces a broad definition of the word person, including individuals, corporations, companies, associations, firms, partnerships, societies, and any other entities.

(8) *Practical technological feasibility.*—This phrase is relevant to the standard by which a manufacturer's conduct in designing a product is measured. The term means the technical, medical, and scientific knowledge relating to product safety which had been developed at the time the product in question was made, was available for and capable of use in the manufacture of a product, and was economically feasible for use by a manufacturer. The phrase is consistent with the overall reasonableness standard in design cases (see sec. 5(b)) by which a manufacturer's conduct is measured. A manufacturer is not reasonably required to do more than was practically and technologically feasible when it designed and made the product.[46]

The "practical technological feasibility" standard is more precise than general standards by which courts and State statutes currently measure a manufacturer's conduct in design changes.[47] As a result, manufacturers will have a clearer guideline to which to conform their conduct, and ambiguities which may be a source of litigation will be minimized. The "practical technological feasibility" standard focuses on what reasonably should have been done and, therefore, differs from an industry practice which focuses on what was actually being done.[48]

(9) *Preponderance of the evidence.*—This standard of proof is that used most often in civil litigation. It is a degree of proof which leads the trier of fact to find that a fact is more probably either true or untrue.[49]

(10) *Product.*—As used in the act, a product is any object, substance, mixture, or raw material in a gaseous, liquid, or solid state which (1) is capable of delivery itself, or which is capable of deliv-

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[45] "Restatement (Second) of Torts" § 400 (1965). See *Smith* v. *Regina Mfg. Corp.,* 396 F.2d 826 (4th Cir. 1968): *Carter* v. *Joseph Bancroft & Sons Co.,* 360 F. Supp. 1103 (E.D. Pa. 1973); *Moody* v. *Sears, Roebuck & Co.,* 324 F. Supp. 844 (S.D. Ga. 1971).

[46] See, e.g., *Lolie* v. *Ohio Brass Co.,* 502 F.2d 741, 744 (7th Cir. 1974); *Boatland of Houston, Inc.* v. *Bailey,* 609 S.W.2d 743 (Tex. 1980).

[47] See Colo. Rev. Stat. § 13-21-403(1) (Supp. 1981); Ky. Rev. Stat. § 411.310(2) (Supp. 1980); *Wilson* v. *Piper Aircraft Corp.* 282 Or. 61, 577 P.2d 1322 (1978).

[48] See Chown v. *USM Corp.,* 297 N.W.2d 218 (Iowa 1980).

[49] See 30 Am. Jur. 2d *Evidence* § 1164 (1967; "McCormick's Handbook of the Law of Evidence," § 339 (E. Cleary 2d ed. 1972).

ery as an assembled whole in a mixed or combined state or as a component part or ingredient; (2) is produced for introduction into commerce; (3) has intrinsic economic value; and (4) is intended for sale or lease. Human tissue and organs are specifically excluded from the definition of "product." [50]

(11) *Product seller*—A product seller is any person engaged in the business of selling, distributing, leasing, installing, preparing, blending, packaging, labeling, marketing, repairing, maintaining, or otherwise placing a product into commerce. This broad definition covers any person in the commercial distribution chain. It follows case law which generally recognizes lessors as product sellers unless they act only in a financial capacity and have no control over the leasing operation.[51]

The definition explicitly excludes sellers of real property.[52] Thus, individual State tort and real estate laws will govern such sales. This exception, however, does not include those who sell building materials, appliances, and products sold for use in or incorporation into housing.

Also excluded from the definition of product seller are those who provide professional services where (1) a product is sold or used as an incidental part of the service and (2) the judgment or skill of the professional is the essence of the transaction. Thus, professional pharmacists, physicians, optometrists, or opticians are not product sellers if they sell a product in connection with and within the scope of rendering their professional services.[53] One who is injured as a result of negligently rendered professional services does not have a product liability claim, but does have remedies under traditional State tort law theories such as malpractice.

Where, however, such professionals engage in commercial sales unrelated to the scope of their professional practice, they may be product sellers. For example, a pharmacist who sells perfume or photographic film may be a product seller within the act because the sale is the principal part of the transaction, and the essence of the relationship is not the furnishing of professional skill or judgment.

Finally, as noted above, the act specifically excludes those who act only in a financial capacity with respect to the sale of a product and lease a product under an arrangement in which the selection, possession, maintenance, and operation of the product are controlled by a person other than the lessor.[54]

(12) *Product user.*—This definition is broad and includes any person who owns, operates, or has control of a product.

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[50] Defects in the human body do not fit the concepts of manufacturing and construction defects or design defects which are the basis of product liability tort law. Human tissue and organs are not susceptible to design defects. Human substances are generally used pursuant to medical treatment and, therefore, claims for harms incident thereto should be limited to claims for negligently performed services.

[51] See generally Annot., 52 A.L.R.3d 121 (1973); Carlin, *Product Liability for the Equipment Lessor? Merchant Lessor* v. *Finance Lessor,* 83 Comm. L.J. 181 (1978); Fraser, "Application of Strict Tort Liability to the Leasing Industry: A Closer Look," 34 Bus. Law. 605 (1979); Henszey, "Application of Strict Liability to the Leasing Industry," 33 Bus. Law. 631 (1978).

[52] The Act does not follow those few cases that have extended product liability law to situations where the seller both builds and sells "mass produced" homes. *E.G. Schipper* v. *Levitt & Sons, Inc.,* 44 N.J. 70, 207 A.2d 314 (1966) (implied warranty).

[53] See *Carmichael* v. *Reitz,* 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); *Bichler* v. *Willing,* 58 App. Div. 2d 331, 397 N.Y.S. 2d 57 (1977); *Barbee* v. *Rogers,* 425 S.W. 2d 342 (Tex. 1968).

[54] See e.g., Idaho Code § 6-1402(1)(c) (Supp. 1982).

(13) *Reasonably anticipated conduct.*—"Reasonably anticipated conduct," as used in the act, focuses on conduct which is expected, usual, ordinary and familiar, and on the class of persons likely to use or be exposed to the product. Not every class of users will necessarily be held to the same standard of conduct. Conduct that may be reasonably anticipated for a child or an elderly person, for example, may be different from the conduct reasonably anticipated for an adult. "Anticipated conduct" emphasizes what is reasonable rather than what is foreseeable. Any conduct can be "foreseeable," particularly in hindsight,[55] e.g., that a soda bottle will be used for a hammer, that someone will attempt to drive a land vehicle on water, that perfume will be poured on a candle in order to scent it. The act avoids the use of hindsight in evaluating a claimant's conduct, while at the same time requiring manufacuturers to anticipate and guard against any reasonably expected conduct.

(14) *State.*—This definition is broad and includes the District of Columbia and all the States, territories, and possessions of the United States.

SECTION 3.—PREEMPTION OF OTHER LAWS

In general

Section 3 defines a product liability action and provides a unified legal theory for these actions. The act supersedes State law on matters governed by the act. It focuses on the most important issues in product liability tort law and leaves other issues to the individual States.

Section 3 does not provide any new basis for Federal court jurisdiction. Thus, the resolution of product liability claims is left to State courts or to Federal courts that currently have, in some circumstances, jurisdiction over those claims.

Present law

Currently, product liability actions are governed by State common law or statute. In States that have no product liability statute, and even in some States which have only partially codified product liability issues, a claimant injured by a product may bring an action for damages based on a number of different substantive legal theories, such as warranty, strict liability, or negligence. The availability of multiple causes of action for a single product-related harm creates unnecessary transaction costs associated with pleading, proving, and defending each legal theory. The act seeks to eliminate these transaction costs and simplify the law by consolidating product liability actions into a single unified legal theory.[56]

Jurisdiction over product liability actions rests with State courts or, where there is currently a basis for Federal jurisdiction, with Federal district courts.[57] The act does not affect these bases for jurisdiciton and, therefore, does not expand the caseload of the Federal courts.

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[55] *See, e.g., Butler* v. *L. Sonneborn Sons, Inc.*, 296 F.2d 623, 625–26 (2d Cir. 1961).

[56] See Unif. Product Liability Act § 102(D), Analysis, 44 Fed. Reg. 62714, 62719 (1979), citing this approach as the recommendation of several groups. Some state statutes, like the Act, define "product liability action" without regard to the legal theory on which the action is brought. See Neb. Rev. Stat. § 25–21,180 (1979); N.H. Rev. Stat. Ann. § 507–D:1 (Supp. 1979); Wash. Rev. Code § 7.72.010.4 (Supp. 1982).

[57] *E.g.*, 28 U.S.C. § 1332 (1976).

As reported

Subsection (a) provides that the act governs any civil action against a manufacturer or product seller for loss or damage caused by a product. The act provides a remedy only for a product-caused harm, as "harm" is defined in section 2(5). This is true despite the legal theory or theories on which the cause of action may have been based prior to the effective date of the act. Thus, subsection (a) merges all theories and creates one unified product liability cause of action. This will eliminate the cost, delay, and confusion associated with pleading, proving, and defending a claim based on the various theories of recovery currently recognized by State law.

Subsection (b) states that recovery for loss or damage caused by a product is limited to loss or damage which constitutes "harm," as defined in section 2(5). Consistent with that definition, subsection (b) states that a civil action for loss or damage to the product or for commercial loss is not a product liability action and is governed by applicable commercial or contract law. This follows traditional law, which leaves recovery for purely commercial losses to actions founded on commercial law. (See sec. 2(5).)

Subsection (c) provides that the act supersedes State law regarding matters governed by the act. The Committee intends that where a matter is not addressed in the act, it remains subject to applicable State law. In applying State law on matters not covered by this act, courts and State legislatures may act in accord with their own State's product liability tort law.

Some commentators recommended that the act preempt State law only to the extent that State law is "inconsistent" with the act. This would create confusion and lead to litigation on the issue of whether and when a State law is "inconsistent" with the Federal statute. For example, a number of States measure a manufacturer's conduct in designing a product by a standard of reasonableness similar to that in the act. That standard, however, varies widely from State to State. If preemption is limited only to State laws "inconsistent" with the act, the provisions of the act would be subject to continuous dispute as to whether they are "consistent" or "inconsistent" with State laws. To avoid confusion and to promote uniformity, the act preempts State law on all matters governed by the act.

Under the Supremacy Clause of the United States Constitution, Congress has the power to enact a Federal law within any area of its authority which replaces State law in that area.[58] Congress has the power under the Commerce Clause of the Constitution[59] to enact a uniform Federal product liability act. The Commerce Clause power extends to interstate and intrastate activities which affect interstate commerce[60] and, therefore, includes manufacturing and selling, which by their nature affect commerce among and between the States. The fact that tort law is traditionally a matter of State law does not alter this rule. Congress has enacted a number of statutes which preempt State tort law.[61] the current climate of uncertainty in product liability law adversely affects and burdens interstate commerce.

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[58] U.S. Const. art. VI, cl. 2.

[59] Id. at art. I, § 8, cl.3

[60] See e.g., *Federal Energy Regulatory Comm'n* v. *Mississippi*, 102 S.Ct. 2126 (1982) (discussion of scope of Commerce Clause); *Fry* v. *United States*, 421 U.S. 542 (1976); *Katzenbach* v. *McClung*, 379 U.S. 294 (1964); *Wickard* v. *Filburn*, 317 U.S. 111 (1942).

The preemption provision in subsection (c) ensures that the rules set forth in the act are uniformly applied in all product liability actions, regardless of where the harm occurred and regardless of which court hears the claim. All courts, State and Federal, with jurisdiction over a product liability action must apply the act. State product liability law, whether statutory or case law, no longer applies to issues governed by the act. The courts must interpret the language of the act in a manner consistent with the intent of Congress.[62] As a result of the uniform standards, the act will resolve many of the problems and ambiguities currently associated with product liability law.

Subsection (d) provides that the act does not create Federal question jurisdiction or jurisdiction based on an act of Congress regulating commerce. Parties may bring a product liability action in Federal court if the Federal forum was available to them prior to passage of the act, e.g., diversity jurisdiction.[63] Product liability cases will continue to be handled by courts currently open to the litigants. Thus, this provision does not create any new basis for Federal court jurisdiction over product liability and will avoid increasing the caseload of the Federal courts.

SECTION 4.—RESPONSIBILITY OF MANUFACTURERS

In general

Section 4 sets forth the alternative bases of a claim against a manufacturer for a product-related harm and several rules applicable to those claims. The provisions of section 4 should be read with the definitions of unreasonably dangerous products set forth in sections 5, 6, and 7. Together, these sections ensure that manufacturers who are responsible for a product-related harm will be subject to liability for that harm.

Present law

Courts and commentators have long struggled with defining the basic standards of responsibility to which product manufacturers are to be held.[64] Much of the controversy can be traced to section

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[61] E.g., Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 et seq. (1978) (imposing liability without regard to fault); Price-Anderson Act, 42 U.S.C. § 2210 (1973 and Supp. 1982) (limiting liability for nuclear power plant accidents); Federal Employer's Liability Act, 45 U.S.C. §§ 51 et seq. (1972) (governing the liability of interstate railway carriers to their employees and altering state tort law on available defenses).

[62] The effect of the Act on state law is the same as the effect, for example, of the Federal Employer's Liability Act on the law applied in actions involving injuries to railroad employees. 45 U.S.C. §§ 51 et seq. (1972). E.g., *Urie* v. *Thompson,* 337 U.S. 163, 174 (1949); *Brown* v. *Cedar Rapids & Iowa City Ry.,* 650 F.2d 159, 161 (8th Cir. 1981); *Isgett* v. *Seaboard Coast Line R. Co.,* 332 F. supp. 1127 (D.S.C. 1971).

[63] 28 U.S.C. § 1332 (1976).

[64] See, e.g., Epstein, "Products Liability: The Search for the Middle Ground," 56 N.C.L. Rev. 643 (1978); Vetri, "Products Liability: The Developing Framework for Analysis," 54 Or. L. Rev. 293 (1975)

402A of the *Restatement (Second) of Torts,* which announced a strict liability standard of responsibility. The authors of section 402A were concerned about manufacturing defects and not about defective designs or warnings.[65] Nevertheless, strict liability has been extended to design and warning cases, although courts have been unable to develop a clear formula for distinguishing between negligence and strict liability.[66]

In drafting the act, the Committee focused on developing standards of responsibility that are fair and clear and that rationally differentiate between different types of conduct. Basically, the act adopts a standard of strict liability, i.e., liability without regard to fault, for harms caused by a defectively constructed or manufactured product (see sec. 5(a)) and for harms caused by breach of an express warranty (see sec. 7). The act adopts a negligence or fault-based standard of responsibility for harms caused by a defective design or formulation (see sec. 5(b)) or failure to warn (see sec. 6).

As reported

Subsection (a) sets forth the two elements of any product liability action against a manufacturer. Both must be established by a preponderance of the evidence, which is defined in section 2(9) and is the standard quantum of proof in civil cases. First, the claimant must establish that the product was unreasonably dangerous. The act specifies the four ways in which a product may be unreasonably dangerous: (1) construction or manufacture, as defined in subsection 5(a); (2) design or formulation, as defined is subsection 5(b); (3) failure to provide adequate warnings or instructions, as defined in section 6, and (4) breach of an express warranty, as defined in section 7.

Second, the claimant must establish that the unreasonably dangerous aspect of the product was a proximate cause of the harm.[67] Proximate cause is generally understood to mean that which is a significant cause of a harm for which the defendant should be held responsible.

Subsection (b) requires the claimant to introduce sufficient evidence to allow a reasonable person, by a preponderance of the evidence, to make the deteminations specified in subsection (a). The act simply incorporates the accepted policy that claims that do not establish a prima facie case should be dismissed at an early stage to conserve judicial resources.

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[65] See "Restatement (Second) of Torts," § 402A, and Appendix (most cases cited deal with defects in manufacturing); Wade, "On the Nature of Strict Tort Liability for Products," 44 Miss. L.J. 825, 830–32 (1973).

[66] See, e.g., *Barker* v. *Lull Engineering Co.,* 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225, (1978); *Phillips* v. *Kimwood Mach. Co.,* 269 Or. 486, 525 P.2d 1033 (1974); see also Wade, "On Product "Design Defects" and Their Actionability," 33 Vand. L. Rev. 551, 576 (1980) ("At present, the question of 'design defects' and the determination of when a product is actionable because of the nature of its design appears to be the most agitated and controversial question before the courts in the field of products liability."); 2 L. Frumer & M. Friedman, "Products Liability," § 16A[4] [f] [iv] at 3B–136.2(b) (1982) ("[T]he courts are still striving to define a true strict liability design case, if there is such a thing.").

[67] Proximate cause presupposes "cause in fact," which is a purely factual inquiry. As one commentator has stated, proximate cause is determined "on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent." W. Prosser, "Handbook of the Law of Torts," 249 (4th ed. 1971).

Subsection (c) prohibits the use of offensive and defensive collateral estoppel in product liability actions except in mass accident cases.

Offensive collateral estoppel permits a claimant to establish a fact or issue in its case against a manufacturer based on a prior decision in a different case brought by a different claimant against the same manufacturer. The manufacturer is "estopped" from litigating the fact or issue in the second case, and is bound by the adverse decision in the prior case. On the other hand, defensive collateral estoppel binds a claimant to an adverse decision on an issue or fact made in a prior case involving a different defendant. Thus, the claimant is prevented from contesting or litigating the fact or issue in all subsequent cases.[68]

Because the estoppel doctrines allow a single determination of a fact or issue to control in subsequent cases, they are unfair and inappropriate in product liability actions where the parties, the issues, and many of the facts giving rise to a subsequent action differ from those in the first case. The doctrines may deprive a party of his day in court, and keep critical facts or issues, which in a tort context differ in almost every case, from the trier of fact.[69]

The reasons for limiting the use of offensive and defensive collateral estoppel do not apply, however, in cases where two or more persons are harmed by the same event—mass accidents, for example. In such cases, the key facts and issues are identical, and individual variants as to the claimant's activity or reaction to the product or event may be irrelevant. For that reason, the act permits parties to use offensive and defensive collateral estoppel in mass accident cases.

The application of offensive and defensive collateral estoppel is an issue raised and litigated routinely in product liability cases.[70] Settling this question with this clear rule of law promotes the goals of the act and leads to a fair resolution of claims and reduced legal costs.

SECTION 5.—PRODUCT CONSTRUCTION AND DESIGN

In general

Section 5 defines when a product is unreasonably dangerous in construction or manufacture, and unreasonably dangerous in design or formulation. The definitions are the key to determining when a manufacturer will be responsible for harms caused by such products, as specified by section 4. The section follows traditional product liability law by imposing strict liability for harms caused by a defectively constructed or manufactured product. In contrast, liability for harms caused by a defective design or formulation is imposed only where the manufacturer was at fault.

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[68] See *generally,* 18 c. Wright, A. Miller & E. Cooper, "Federal Practice & Procedure: Civil," §§ 4416, 4463 (1981).

[69] See *Williams* v. *Laurence-David, Inc.*, 271 Or. 712, 534 P.2d 173 (1975) (refusing to apply offensive collateral estoppel, but noting that it may be appropriate in some situations, such as a mass accident).

[70] E.g., *Ezagui* v. *Dow Chemical Corp.*, 598 F.2d 727 (2d Cir. 1979).

Present law

Product liability claims alleging that the product was defectively constructed or manufactured have long been based on the theory of strict liability. As far back as 1913, manufacturers of products intended for human consumption were held strictly responsible for harms caused by a product which was flawed due to a construction or manufacturing defect.[71] The concept of strict liability for construction or manufacturing defects was subsequently extended to nonconsumable products.[72]

One justification for imposing liability without fault upon product manufacturers in these types of cases is that product users have a right to expect that a product will be free from manufacturing or construction defects. If a product unit is flawed, as measured by the manufacturer's own standards, and the flaw causes harm, the manufacturer should be held responsible for that harm. Therefore, claimants should recover for harms caused by such defects without having to prove that the manufacturer was at fault. Strict liability is not only fair to product users, it also provides a degree of predictability. A manufacturer and his insurer can estimate the effectiveness of quality control procedures, and provide insurance against the potential risks of an undetected construction or manufacturing defect.

On the other hand, strict liability should not be applied to product claims alleging design or formulation defects. Although a number of courts have attempted to justify strict liability in this area,[73] there are practical and public policy reasons for adhering to a negligence or fault-based standard of liability in design or formulation cases. Strict liability in design or formulation defect cases is unfair and unworkable. Within the traditional confines of the tort system, strict liability has been recognized as inappropriate in actions against engineers, architects, physicians, lawyers, pilots and almost all other persons. There is no cogent rationale for singling out manufacturers as a group for strict liability treatment.

The risk distribution rationale often advanced for strict liability does not work in design or formulation defect cases. If a manufacturer is to be liable for every harm caused by a product design or formulation on the theory that it is in the best position to distribute the risks and costs of such liability, the tort litigation system is not the mechanism to achieve that result. It would be more efficient to achieve that goal through a no-fault, limited damage compensation system, similar to worker compensation systems.

Strict liability theories applied in the design area leave the trier of fact without meaningful guidelines as to when liability is to be fairly assessed. Almost any product design or formulation could be found defective under a strict liability theory because, in hindsight, a different design is always possible. A fault-based standard, however, provides guidelines which can be understood and put into practice by manufacturers, and can be administered by courts and juries whose background and experience provide a good gauge for determining what is reasonable conduct. This will promote product safety in the design area because manufacturers will have an incentive to meet the stated standard of conduct and to avoid liability. Moreover, the standard allows recovery for harms due to a manufacturer's unreasonably dangerous design or formulation.

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[71] E.g., *Mazetti* v. *Armour & Co.*, 75 Wash. 622, 135 P. 633 (1913); *Coca-Cola Bottling Works* v. *Lyons*, 145 Miss. 876, 111 So. 305 (1927); *Shoshone Coca-Cola Bottling Co.* v. *Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966).

[72] E.g., *Greenman* v. *Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *Phipps* v. *General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976); *Tucker* v. *Unit Crane & Shovel Corp.*, 256 Or. 318, 473 P.2d 862 (1970). See also "Restatement (Second) of Torts" at § 402A.

[73] See cases cited supra note 29. See also Rindlisbaker v. Wilson, 95 Idaho 752, 519 P.2d 421 (1974); Stewart v. Scottkitz Miller Co., 626 P.2d 329 (Okla. Ct. App. 1981); Caterpillar Tractor Co. v. Gonzales, 599 S.W.2d 633 (Tex. Civ. App. 1980).

As reported

Subsection (a) defines a construction or manufacturing defect that renders a product unreasonably dangerous and subjects a manufacturer to liability. A product unit is unreasonably dangerous in construction or manufacture if, when it left the manufacturer's control, it materially deviated from either (1) the design specifications, formula, or performance standards of the manufacturer, or (2) otherwise identical units manufactured to the same manufacturing specification or formula.[74]

Both facets of the definition focus on a "material" deviation of the product at the time it left the manufacturer's control. If the deviation was not "material", it would not render the product unreasonably dangerous.[75] The deviation must have existed when it left the manufacturer's control.[76] This ensures that the deviation was caused by an error in manufacturing and that the product unit that caused the harm is measured against otherwise identical products manufactured to the same specifications.

The first facet of the definition focuses on whether the product varies from the manufacturer's design specifications, formulae, or performance standards. This is an objective test, requiring a comparison of the product unit that caused the harm with the product the manufacturer intended to make. The second facet of the definition requires an objective comparison of the product that caused the harm with otherwise identical units being made pursuant to the intended process. This second facet of the definition recognizes that some products are not made to a product sepcification but are made pursuant to a standard manufacturing specification or process.

Where an objective comparison reveals a defectively constructed or manufactured product, the manufacturer is responsible for harms proximately caused by that defect. Neither the fault nor the degree of care used by the manufacturer are relevant under this strict liability standard or responsibility. The focus is solely on the condition or performance of the product; the conduct of the manufacturer is irrelevant.

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[74] Frumer & Friedman, supra note 29 at 3B–132–32.1 ("[T]he basic issue is whether the product performed as it was designed to perform, or whether it performed as other products of the same kind.")

[75] E.g., *Wiseman* v. *Goodyear Tire & Rubber Co.*, 29 Wash. App. 883, 631 P.2d 976, 979–80 (1981) ("Some products defectively manufactured are still reasonably safe for the consumer. A car with an inadequate heater is defective but not unreasonably dangerous. . . .").

[76] See "Restatement (Second) of Torts" at § 402A comment g. *Cf. Hester* v. *Montgomery Elevator Co.*, 392 So. 2d 155 (La. Ct. App. 1980) (defendant manufacturer not strictly liable because the product was not in its control).

A construction or manufacturing defect case must be distinguished from a design defect case. When a claimant alleges that the design of the product is unreasonably dangerous, the allegation relates to a defect in all products made according to that design rather than to a single product unit. A design defect case must be evaluated under subsection 5(b).

Subsection (b) defines a design or formulation defect which renders a product unreasonably dangerous and subjects a manufacturer to liability. Unlike the definition of a construction or manufacturing defect in subsection (a), this definition focuses on the reasonableness of the conduct of the manufacturer in choosing a particular product design. A product is unreasonably dangerous in design or formulation if, at the time the product was made or certified, whichever is earlier, a reasonably prudent manufacturer in the same or similar circumstances would not have used the design or formulation.[77]

Judicial departures from the negligence standard in favor of a strict liability standard in the area of design liability have caused great confusion and uncertainty.[78] Strict liability, that is liability without regard to the conduct or fault of the manufacturer, is not a meaningful standard in design or formulation defect cases. The reasonableness or fault-based standard adhered to by a number of courts and by section 5 provides guidance to manufacturers, courts, and juries. It requires manufacturers to design their products with reasonable prudence and requires juries or courts to hold them responsible for harms caused by their failure to do so. Juries and courts have long been charged with applying standards of reasonableness in tort cases, and there is ample evidence that they can do so fairly in product liability cases.

Some have contended that an appropriate test for design liability should go beyond a reasonableness test to include what has been called a risk-utility analysis.[79] Under this analysis, a comparison is made between the utility of a particular design feature of the product and the danger it creates.

While such tests may be helpful in assessing negligence, as the Restatement (Second) of Torts has recognized,[80] they are tests best applied by a judge in deciding whether a case should go to the jury rather than by a jury of lay persons. A jury of lay persons is better able to understand and apply the traditional tort law standard of "reasonable prudence."[81]

It has also been argued that the use of a "reasonably prudent manufacturer" test may permit manufacturers to hide behind industry custom, thus permitting inadequate safety standards to prevail. As the Restatement demonstrates, however:

> No group of individuals and no trade can be permitted, by adopting careless and slipshod methods to save time, effect, or money, to set its own uncontrolled standard at the expenses of the rest of the community. If the only test

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[77] See "Restatement (Second) of Torts" at § 398 (manufacturers liable for "failure to exercise reasonable care in the adoption of a safe plan or design").

[78] See cases cited supra notes 29 and 39.

[79] See *Barker* v. *Lull Engineering Co.*, 20 Cal. 3d 413, 143 Cal. Rptr. 225, 573 P.2d 443 (1978).

[80] *Restatement (Second) of Torts* §§ 291-293.

[81] Wade, "On Product 'Design Defects' and Their Actionability," 33 Vand. L. Rev. 551 (1980).

> is to be what has always been done, no one will ever have any great incentive to make any progress in the direction of safety. It follows, therefore, that whenever the particular circumstances, the risk, or other elements in the case are such that a reasonable [person] would not conform to the custom, the actor may be found negligent and conforming to it; and whenever a reasonable [person] would depart from the custom, the actor may be found not to be negligent in so departing.[82]

The law of torts is therefore clear that reasonably prudent conduct is not merely what everybody in a particular industry does, but rather what is prudent conduct under the circumstances.[83] Thus, the test embodied in this section is comprehensible to a jury and fair to all parties in determining whether a manufacturer acted irresponsibly in designing its product.

In applying the reasonableness standard, the focus is on the time that the product was manufactured or certified by the Government.[84] This assures that a manufacturer's conduct is not judged according to design or formulation standards developed after the product in question was manufactured [85] or certified. The use of hindsight in evaluating prior conduct is unfair. Apply today's knowledge to judge the reasonableness of yesterday's conduct is inconsistent with fundamental principles of jurisprudence.

Subsection (b) requires proof that the manufacturer knew, or based on knowledge in the scientific, technical, or medical community should have known, about the danger in the design or formulation that caused the claimant's harm. Thus, a manufacturer is liable for a design or formulation defect only if it had knowledge of the danger associated with the design, or if there was a reasonable basis for imputing that knowledge to the manufacturer. Knowledge is imputed to a manufacturer if it is knowledge reasonably accepted in the relevant learned communities. A manufacturer has a duty to remain informed of scientific, technical, and medical design advances and is presumed to know of those reasonably accepted advances.[86] This promotes the manufacture of safe products and ensures that ignorance is not a shield to liability for harms caused by a defective design or formulation.

Subsection (b) also provides that a product is unreasonably dangerous in design or formulation if a means to eliminate the danger that caused the harm was within "practical technological feasibility," as that phrase is defined in section 2(8). Similar to the knowledge requirement discussed above, this approach recognizes that it is unfair to hold a manufacturer responsible for a design or formulation that could not have been improved given the knowledge existing at the time the product was made.

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[82] "Restatement (Second) of Torts," § 295 A, comment C. See e.g., *Marsh Wood Products Co.* v. *Babcock and Wilcox*, 207 Wis. 209, 240 N.W. 392 (1932).

[83] Prosser, "Handbook of the Law of Torts," 168–170 (4th ed. 1971).

[84] With respect to product designs which must be certified by the Federal government *See e.g.*, 49 U.S.C. §§ 1423–30 (1976) (Federal Aviation Administration certification of aircraft), the reference must be to the time of certification. Because a certified design may not be altered or changed by the manufacturer in any way, the reference must be to the time of certification rather than the time of manufacture, which will be some point after certification.

[85] *E.g., Boatland of Houston, Inc.* v. *Bailey*, 609 S.W.2d 743 (Tex. 1980).

[86] See *Borel* v. *Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974); *Howard* v. *Avon Prods. Inc.*, 155 Colo. 444, 395 P.2d 1007 1964); *Braun* v. *Roux Distrib. Co.*, 312 S.W.2d 758 (Mo. 1958).

Subsection (c) states that a product is not unreasonably dangerous in design or formulation if the harm was caused by an unavoidably dangerous aspect of a product which, given the knowledge at the time the product was made, could not have been eliminated without seriously impairing either the effectiveness of the product's intended function or the desirability of the product to the user or consumer.

This definition is consistent with the rule set forth in the "Restatement (Second) of Torts." [87] That rule provides that a manufacturer is not responsible where it supplies the public with a "useful and desirable product, attended with known but apparently reasonable risks." This standard requires proof that, at the time of manufacture, the products risks cannot be eliminated without also impairing the product's functions or benefits. For example, the unavoidable risks that accompany the rabies vaccine are outweighed by the benefits of the vaccine, which effectively prevents a painful death. Therefore, a manufacturer who produces the vaccine produces a "useful and desirable product, attended with known but apparently reasonable risks." An unreasonably dangerous child's toy, that is, one with a high risk of electrocution, however, is not such a product. That risk can be eliminated without seriously impairing the effectiveness or desirability of the toy to its users.

Subsection (d) states that a product is not unreasonably dangerous in design if the harm was caused by an unsafe aspect of the product which was an inherent characteristic of the product and which would be recognized by the ordinary product user who possesses ordinary knowledge common in the community. This common knowledge exception incorporates a principle of the "Restatement (Second) of Torts."[88] That principle recognizes that some products desired by consumers "cannot possibly be made entirely safe." This fact does not, however, render them defective in design.

Some products have inherent characteristics which involve a risk of harm. For example, butter is not unreasonably dangerous because it may deposit cholesterol in the arteries, and whiskey is not unreasonably dangerous because it may lead to alcoholism. If these products are contaminated, they may be found to be defectively constructed. In their normal state, however, they are not defectively designed. The risks associated with sugar, butter, whiskey, knives, and other products are the result of inherent characteristics of the product and are "recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the community."[89]

The design of a product that has unique or inherent design features is judged with those features in mind. For example, a convertible automobile has a unique feature—a removable or soft top—which cannot be eliminated without impairing the desirability of the vehicle to a consumer who wants a convertible. The reasonableness of the convertible design should be judged according to a reasonable convertible design should be judged according to a reasonable convertible design rather than according to the safety of a standard sedan automobile.[90]

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[87] See § 402A comment k.

[88] *See* § 402A comment i.

[89] Prosser, supra note 30, at 659. "There must . . . be something wrong with the product which makes it unreasonably dangerous to those who come in contact with it. An ordinary pair of shoes does not become unreasonably unsafe merely because the soles become somewhat slippery when wet; nor is there unreasonable danger in a hammer merely because it can mash a thumb. Knives and axes would be quite useless if they did not cut." Id.

The common knowledge exception is based on an objective standard of what the ordinary person in the community knows, not on a subjective standard of what the particular claimant knew or did not know. This is consistent with the standard of reasonableness applied in design defect cases. A manufacturer acts reasonably when it makes a product which, despite the known risks associated with its inherent characteristics, is desired by consumers.

Subsection (e) specifies that an alternative product design may be evidence that the design of the product in question was unreasonably dangerous if certain requirements are established. First, the claimant must demonstrate that, at the time the product was made, the manufacturer knew, or based on knowledge which was reasonably accepted in the relevant scientific, technical, or medical community should have known, about the alternative design offered as evidence by the claimant. If knowledge of the alternative design cannot be imputed to the manufacturer under that standard, the alternative design cannot be used against the manufacturer. A manufacturer is not required to know every possible new device which has been conceived, but it is considered to know about those which are reasonably accepted in the relevant learned communities.[91] This standard is similar to the reasonableness standard applied throughout subsection 5(b)

Second, the claimant must show that if the alternative design had been used, it would have met three requirements: (1) it would have used science and technology which was reasonably accepted in the scientific, technical, or medical communities and which was within practical technological feasibility; (2) it would have prevented the claimant's harm and provided overall safety equivalent to or greater than the chosen design or formula; and (3) it would have been functionally and economically desirable to the peson who uses it.

Thus, an alternative design that employs technology that was not recognized by the relevant communities or that was not feasible[92] cannot be used to establish that the challenged product design was unreasonably dangerous. This is consistent with the principle that the product in question must be judged by standards which are reasonable in light of knowledge in the community at the time of manufacture. In addition, an alternative design creating greater hazards than it eliminates is not evidence that the chosen product design was unreasonably dangerous. Finally, the alternative design must be one that would have been desirable to the person who uses or consumes it. This is similar to the language used in subsections 5(c) and (d). It recognizes that, although an alternative design may exist, it may be undesirable to consumers because it could cause unacceptable wear on the product, require unacceptable maintenance, or be economically impractical.[93]

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[90] See, e.g., *Dreisonstok* v. *Volkswagenwerk, A.G.*, 489 F.2d 1066, 1075 (4th Cir. 1974) ("If a person purchases a convertible . . . he cannot expect—and the Court may not impose on the manufacturer the duty to provide him with—the exact kind of protection in a rollover accident as in the 'standard American passenger car.' ") (dicta). See also *Curtis* v. *General Motors Corp.*, 649 F.2d 808 (10th Cir. 1981).

[91] See *Maxted* v. *Pacific Car & Foundry Co.*, 527 P.2d 832 (Wyo. 1974).

[92] See *Boatland of Houston, Inc.* v. *Bailey*, 609 S.W.2d 743 (Tex. 1980).

SECTION 6.—PRODUCT WARNINGS OR INSTRUCTIONS

1. In General

Section 6 defines when a product is unreasonably dangerous due to a manufacturer's failure to provide warnings or instructions with the product. The standard of responsibility is predicated on fault. If the claimant establishes by a preponderance of the evidence that the product was unreasonably dangerous under the definition in section 6, and that the condition was a proximate cause of the claimant's harm, the manufacturer will be responsible for the harm, as specified by section 4.

2. Present law

Traditional product liability law follows a fault-based theory of liability in warning or instruction cases.[94] The fault-based standard focuses on what a reasonable manufacturer would have done with respect to product warnings or instructions. This standard is readily understood by litigants and the trier of fact. It utilizes concepts that are a matter of common knowledge and expertise. More important, a fault-based standard is fair and promotes product safety.

A few courts have attempted to justify the application of strict liability without regard to fault in duty to warn cases.[95] As in defective design or formulation cases, strict liability for failure to warn is unfair and unworkable. It provides no guidelines to which a manufacturer can conform its conduct to avoid or minimize liability, and, therefore, does not promote product safety. The Committee believes that a fault-based standard rather than a strict liability standard in warning cases will promote product safety and create certainty and uniformity in the application of the law. The standard will permit recovery for harms caused by a manufacturer's wrongful failure to warn, and will provide certainty in both tort litigation and insurance ratemaking.

As reported

Subsection (a) states that a product is unreasonably dangerous for failure of the manufacturer to provide warnings related to a danger associated with or instructions for the use of the product if (1) necessary warnings or instructions were not given or (2) post-manufacture warnings or instructions were not given. Both situations are described in more detail in the following subsections. A product may be unreasonably dangerous under section 6 even though it is not unreasonably dangerous in design or in construction. A properly designed and constructed product may present hazards about which a manufacturer has a duty to warn or instruct.[96]

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[93] *E.g., Bundie* v. *Skil corp.,* 489 F. Supp. 19 (E.D. Pa. 1980); *Boatland of Houston, Inc.* v. *Bailey,* 609 S.W.2d 743 (Tex. 1980).

[94] See *Smith* v. E.R. Squibb & Sons, Inc., 405 Mich. 79, 273 N.W.2d 476, 480 (1979) ("[W]hen liability turns on the adequacy of a warning, the issue is one of reasonable care, regardless of whether the theory pled is negligence, implied warranty, or strict liability in tort . . . . .").

[95] E.g., *Canifax* v. *Hercules Power Co.,* 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); *Woodhill* v. *Parke Davis & Co.,* 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978), *aff'd,* 79 Ill. 2d 26, 402 N.E.2d 194 (1980). *Cf. Beshada* v. *Johns-Manville Prods. Corp.,* 90 N.J. 191, 447 A.2d 539 (1982) (imposing liability for failure to warn of unknown risks).

Subsection (b) defines when a product is unreasonably dangerous for lack of necessary warnings or instructions. This situations embraces two concepts—whether the manufacturer had a duty to warn or instruct, and whether the warnings or instructions given were adequate. The factors relevant to both concepts overlap and are combined in subsection (b). The emphasis on the factors depends on the type of case a claimant alleges.

To establish a claim based on subsection (b), the claimant must prove four factors. Each factor must be established by a preponderance of the evidence, the traditional standard of proof in a civil case. (See sec. 2(9).) Each is evaluated as of the time the product was sold. This requires that the trier of fact, in considering the factors, place itself in the manufacturer's position at that point in time. This is consistent with traditional law and with the fault-based reasonableness standard that runs throughout section 6. The trier of fact may not use hindsight to judge the reasonableness of the manufacturer's conduct, because with hindsight and newly acquired knowledge almost any course of conduct could be considered unreasonable.

The first factor a claimant must establish is that at the time the product was sold, the manufacturer knew, or based on knowledge which was reasonably accepted in the relevant scientific, technical, or medical communities, should have known of the product danger that caused the claimant's harm. If the act imposed liability for failure to warn about unknowable risks, it would depart from the standard of reasonableness.[97] A manufacturer has a duty to warn or instruct about dangers which it knew or about which a reasonable manufacturer would have known at the time the product was sold.[98] Thus, a manufacturer has a duty to keep abreast of developments in the learned communities and is deemed to know about developments reasonably accepted in those communities.

Second, the claimant must show that at the time the product was sold, the manufacturer failed to provide warnings that a reasonably prudent manufacturer in the same or similar circumstances would have provided. This focuses both on whether there was a duty to warn and on the adequacy of the warning, such as its clarity and conspicuousness. With regard to whether there was a duty to warn, the likelihood and seriousness of harm of the type alleged by the claimant are considered. The greater the risk or seriousness of harm, the greater the manufacturer's duty to warn. The factors relevant to a determination of adequacy will vary with each case.

Third, the claimant must demonstrate that the manufacturer failed to provide warnings or instructions to the claimant or to another person in accordance with subsection (d).

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[96] E.g., *Jacobson* v. *Colorado Fuel & Iron Corp.*, 409 F.2d 1263, 1271 (9th Cir. 1969); *Haugen* v. *Minnesota Mining & Mfg. Co.*, 15 Wash. App. 379, 550 P.2d 71 (1976) (applying strict liability).

[97] See *Beshada* v. *Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982).

[98] *See e.g., Woodill* v. *Parke Davis & Co.*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

Fourth, the claimant must show that those warnings, if provided by the manufacturer, would have led a reasonably prudent product user to decline to use the product or to avoid harm from the product. The focus is on how a reasonable product user would have responded to the warning, not on how the claimant would have responded.

Subsection (c) defines when a product is unreasonably dangerous for lack of postmanufacture warnings. The claimant must show: (1) that after the product was made, the manufacturer knew or, based on knowledge which was reasonably accepted in the scientific, technical, or medical community, should have known of the product danger which caused the claimant's harm; and (2) that a reasonably prudent manufacturer in the same or similar circumstances would have provided portmanufacture warnings or instructions,[99] given the likelihood that the product would cause harm of the type alleged by the claimant and given the seriousness of that harm. If a manufacturer made reasonable efforts to provide postmanufacturer warnings, the product is not unreasonably dangerous. What is a reasonable effort varies with each case.[100]

Subsection (d) specifies, first, situatioins where the manufacturer may satisfy the duty to warn or instruct by warning someone other than the claimant and, second, situations where there is no duty to warn or instruct.

Generally, the warnings or instructions must be given to the person in the position to prevent product-related harms—in most instances, the product user. However, the law recognizes that in some situations the warnings or instructions, as a practical matter, may be given to someone other than the product user. Subsection (d) is in accord with this rule.

First, the warnings or instructions may be given to a person who reasonably could be expected to assure that action would be taken to avoid the harm, or that the risk of harm would be explained to the product user, except where the warnings or instructions can be readily attached to the product in a form that could reach the claimant. The "Restatement (Second) of Torts" also recognizes that a manufacturer may satisfy its duty by giving the necessary warnings and instructions to a third person who can reasonably be expected to warn or protect the user against harm.[1] Third persons to whom the warning may be given fall into a variety of categories.[2] In determining whether it is reasonable to expect that a particular third person to whom the warnings were given would assure that action would be taken to avoid the harm or that the risk of harm would be explained to the user, a number of facts may be relevant including, for example, whether the third person had a relationship with the user, such as a parent-child relationship or employer-employee relationship, which by statute, regulation, or common law imposes upon the third person an affirmative duty to act.

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[99] See *Braniff Airways, Inc.* v. *Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969), on rehearing, 424 F.2d 427 (2d Cir. 1970), cert. denied, 396 U.S. 959 (1969).

[100] See Comment, *"Products Liability: Post-Sale Warnings,"* 1978 Ariz. St. L.J. 49 (1978).

[1] See "Restatement (Second) of Torts" at § 388 comment n.

[2] See, e.g., *Wilhelm* v. *Globe Solvent Co.*, 373 A.2d 218 (Del. 1977) (no duty to warn employee where employer has knowledge); *Bellotte* v. *Zayre Corp.*, 116 N.H. 52, 352 A.2d 723 (1976) (parent) (dicta); *Schmeisar* v. *Trus Joist Corp.*, 273 Or. 120, 540 P.2d 998 (1975) (contractor); *Reed* v. *Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478 (1979) (employer). *Cf.*, *LaBelle* v. *McCauley Indus. Corp.*, 649 F.2d 46 (1st Cir. 1981).

Subsection (d)(1)(A) recognizes, however, that where there is a duty to warn and when the warnings or instructions can be readily attached to the product in a form that could reach the claimant, they must be attached. Where a warning or instruction cannot as a practical matter be attached to the product or its packaging in a form that could reach the user, however—for example, where the warning would not remain visible to the claimant during normal use of the product—this subsection will not apply.

Under subsection (d)(1)(B), warnings or instructions may be provided to an expert who uses or supervises use of a product—such as a prescription drug—that may be legally used only by or under the supervision of a class of experts. In those circumstances, there is no duty to warn the claimant directly; experts may reasonably be expected to take action to avoid the harm or explain the risk of harm to the product user. For example, a manufacturer of a drug that can be sold and used only with the prescription of a physician has a duty to warn the physician of the risks associated with the drug. Warnings to the patient are not required. A doctor's skill and expertise is needed to evaluate whether the risks outweigh the benefits of the drug to the individual patient.[3] Under this subsection, actual personal notice is not required; means reasonably calculated to make the warning available to the expert are sufficient.

Under subsection (d)(1)(C), warnings or instructions given to the manufacturer's immediate buyer are sufficient in certain situations where it is impracticable to provide warnings to the product user. For example, where the product is sold as a component part or material to be incorporated into another finished product, and the claimant is exposed to the component or material after the product is incorporated or converted into the finished product, a warning or instruction to the immediate buyer is sufficient. A manufacturer cannot be expected to anticipate the hazards associated with its product as incorporated, nor can it identify or reach the purchasers or users of the finished product.

Similarly, where the product is used in a workplace, or where the claimant is not an employee of the manufacturer's immediate buyer and there is no practical feasible means to warn the claimant directly, the warning or instruction may be given to the immediate buyer.[4] In such situations, the manufacturer is unable to identify or adequately train the actual product user, and therefore may communicate the necessary warnings or instructions to the immediate buyer. The act recognizes that the immediate buyer may be the only person in a position to train or supervise the users of the product.

Subsection (d) also specified three situations in which a manufacturer has no duty to warn or instruct. Following traditional law, there is no duty to warn or instruct about obvious dangers. Warnings to a reasonably prudent user, or other person who is expected to pass warnings on to the user, about a danger that is a matter of common knowledge to people in the claimant's position serve no purpose.[5] This provision includes the so-called "sophisticated purchaser" exception, under which a manufacturer has no duty to warn or instruct a person who has sophisticated knowledge about the product and therefore knows of the associated risks.[6] Requiring manufacturers to warn or instruct race car drivers about obvious dangers associated with the operation of high speed racing vehicles would dilute the effectiveness of warnings or instructions about dangers which are not obvious.[7]

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[3] See *Stanback* v. *Parke, Davis & Co.*, 502 F. Supp. 772 (W.D. Va. 1980), aff'd, 657 F.2d 642 (4th Cir. 1981); *Dunkin* v. *Syntex Labs., Inc.*, 443 F. Supp. 121 (W.D. Tenn. 1977); *Carmichael* v. *Reitz*, 17 Cal. App. 3d 958, 95 Cal. Rptr. 381 (1971); *Bacardi* v. *Holzman*, 82 N.J. Super. 442, 422 A.2d 617 (1981); *Terhune* v. *A.H. Robins Co.*, 90 Wash. 2d 9, 577 P.2d 975 (1978).

[4] See *Weekes* v. *Michigan Chrome & Chem. Co.*, 352 F.2d 603 (6th Cir. 1965); *Jones* v. *Hittle Serv., Inc.*, 219 Kan. 627, 549 P.2d 1383 (1976); *Schmeiser* v. *Trus Joint Corp.*, 273 Or. 120, 540 P.2d 998 (1975); *Reed* v. *Pennwalt Corp.*, 22 Wash. App. 718, 591 P.2d 478 (1979).

A manufacturer has no duty to warn or instruct about the consequences of product misuse or use contrary to the warnings or instructions available. It is unreasonable to require a manufacturer to warn about the consequences of every possible product misuse.[8] In addition, section 10 of the act holds the product user responsible for harms caused by his or her own misuse of the product, and it would be contrary to the intent of that section to require that a manufacturer warn about the consequences of misuse. for the same reasons, a manufacturer has no duty to warn or instruct about the consequences of product alterations or modifications which are not reasonably anticipated conduct.[9]

SECTION 7.—PRODUCT EXPRESS WARRANTY

In general

Section 7 states that a product is unreasonably dangerous for failure to conform to an express warranty made by the manufacturer. As defined in section 2(4), an express warranty is any affirmation of fact, promise, or description relating to a product. To be actionable, the express warranty must relate to a material fact regarding the safe performance of the product, and the failure to conform to that warranty must cause the claimant's harm. This section adopts the generally recognized strict liability standard for breach of an express warranty.

Present law

The overwhelming majority of cases impose strict liability on a manufacturer who fails to meet its own express warranty.[10] Strict liability is fair in these instances because a manufacturer who extends an express warranty to a product user should be expected to meet that warranty. A product user has the right to rely on the manufacturer's representations as true and, therefore, should recover for harms caused by the breach of that warranty without regard to whether the manufacturer acted negligently or with due care.

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[5] E.g., *Garrison* v. *Heublein, Inc.*, 673 F.2d 189 (7th Cir. 1982); *Colson* v. *Allied Prods. Corp.*, 640 F.2d 5 (5th Cir. 1981); *Brech* v. *J.C. Penny Co.*, 532 F. Suypp. 916 (D.S.D. 1982); *Simpson* v. *Hurst Performance, Inc.*, 437 F. Supp. 445 (M.D.N.C. 1977), aff'd, 588 F.2d 1351 (4th cir. 1978); *Huff* v. *Elmhurst-Chicago Stone Co.*, 95 Ill. App. 3d 1091, 419 N.E.2d 561 (1981); *Durkee* v. *Cooper of Canada, Ltd.*, 99 Mich. App. 693, 298 N.W.2d 620 (1980); *Claytor* v. *General Motors Corp.*, 286 S.E.2d 129 (S.C. 1982).

[6] E.g., *Brown* v. *Link Belt Div. of FMC Corp.*, 666 F.2d 110 (5th Cir. 1982); *Fierro* v. *Int'l Harvestor Co.*, 127 Cal. App. 3d 862, 179 Cal. Rptr. 923. (1982).

[7] Twerski, Weinstein, Donaher & Piehler, "The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age," 61 Cornell L. Rev. 495, 514 (1976)

[8] See *Kysor Indus. Corp.* v. *Frazier*, 642 P.2d 908 (Colo. 1982); *Curry* v. *Louis Allis Co.*, 100 Ill. App. 3d 910, 427 N.E.2d 254 (1981); *Potmesil* v. *E. I. duPont De Nemours Co.*, 408 So.2d 315 (La. App. 1981), cert. denied, 412 So. 2d 1097 (La. 1982); *Stigler* v. *Bell*, 276 So. 2d 799 (La. App. 1973); *turner* v. *Manning, Maxwell & Moore, Inc.*, 216 Va. 245, 217 S.E.2d 863 (1975).

[9] See *Talley* v. *City Tank Corp.*, 158 Ga. A. 130, 279 S.E.2d 264 (1981); *Rodriquez* v. *Besser Co.*, 115 Ariz. 454, 565 P.2d 1315 (1977); *Westerberg* v. *School District No. 792*, 276 Minn. 1, 148 N.W.2d 312 (1967).

[10] E.g., *Baxter* v. *Ford Motor Co.*, 179 Wash. 123, 35 P.2d 1090 (1934). See also Prosser, supra note 30, ag 652 ("decisions to the contrary have been amazingly few").

Strict liability for breach of express warranty can also be absorbed in the existing liability insurance system. A manufacturer and its insurer can predict with some accuracy the potential risks of product liability associated with breach of an express product warranty, and a manufacturer can minimize those risks by exercising care about the warranties it makes.

As reported

Subsection (a) defines when a product is unreasonably dangerous for failure to conform to an express warranty, as that term is defined in section 2. The claimant must show (1) the manufacturer made an express warranty about a material fact relating to the safe performance of the product; (2) the warranty proved to be untrue; and (3) the failure to conform to the warranty caused the harm. The focus is solely on the condition or perfomance of the product. If the product's condition or performance fails to satisfy an express warranty and that failure causes a harm, and if the claimant establishes the other elements of subsection 4(a), the manufacturer is strictly liable.[11]

The express warranty must be about a material fact relating to the safe performance of the product. A material fact relates to any specific characteristic or quality of the product, but does not include a general opinion about, or general praise of, the product or its quality (see sec. 7(a)). Product users do not rely on immaterial statements when purchasing or using a product, nor do they rely on general opinions about or praise of the product. A product user could not bring a product liability claim based on the failure of the product to satisfy the manufacturer's "puff" or sales talk.[12] Where there is no basis for relying on a warranty, there is no basis for bringing a product liability claim for breach of that warranty.

Subsection (b) states that a product may be unreasonably dangerous under section 7 even though the manufacturer's conduct in making the express warranty was not negligent or fraudulent. In other words, whether the manufacturer acted reasonably and with due care is irrelevant and not a defense.

SECTION 8.—RESPONSIBILITY OF PRODUCT SELLERS

In general

Section 8 specifies when a product seller is responsible for a product-related harm. It provides that a product seller will be responsible if it fails to exercise reasonable care with respect to the product or it breaches an express warranty it made, and that conduct causes the harm. This is consistent with the principle that a party should be responsible only for harms caused by its own conduct. Product sellers are routinely sued in product liability actions despite the fact that they rarely are responsible for the harm. In these situations, sellers are usually able to shift any liability imposed on them to the responsible party. While they usually do not bear the ultimate costs of these product liability judgments, sellers do pay large legal costs in these situations.

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[11] See *Hauter* v. *Zogarts*, 14 Cal. 3d 104, 534 P.2d 377, 120 Cal. Rptr. 681 (1975); *Spiegel* v. *Saks 34th Street*, 43 Misc. 2d 1065, 252 N.Y.S.2d 852 (1964), *aff'd*, 26 App. Div. 2d 660, 272 N.Y.S.2d 972 (1966). See also "Restatement (Second) of Torts" at § 402B (using the term "misrepresentation" rather than "express warranty").

[12] E.g., *Hoffman* v. *A.B. Chance Co.*, 339 F. Supp. 1385 (M.D.Pa. 1972); *Jakubowski* v. *Minnesota Mining & Mfg.*, 80 N.J. Super. 184, 193 A.2d 275 (1963), rev'd on other grounds, 42 N.J. 177, 199 A.2d 826 (1964).

Section 8 helps to eliminate the costs associated with defending these suits by ensuring that product sellers are responsible only for harms caused by their own conduct.

Section 8 departs from the concept of individual responsibility in one respect. If the manufacturer responsible for the harm is not subject to service of process, or if the court determines that a judgment would be unenforceable against the manufacturer, the product seller may be treated as if it were the manufacturer. Thus, the product seller may be held fully responsible even though its conduct did not cause the harm. The claimant is thereby assured a source of recovery where an unreasonably dangerous product has caused his harm.

Present law

Under present law, product sellers, including wholesaler-distributors, and retailers, are generally subject to the same standards of responsibility as manufacturers. Thus, in many States, the theory of strict liability for a product-related harm applies to product sellers.[13] The result is that product sellers are sued for product-related harms that they did not cause and over which they have no control. In holding a retailer responsible, one court noted that "the retailer may be the only member of that enterprise [that produced and marketed the product] reasonably available to the injured plaintiff," and in a position to exert pressure to ensure that the manufacturer makes a safe product.[14]

Statistics show, however, that product sellers account for less than 5 percent of product liability payments.[15] Although they are routinely sued in product liability claims, product sellers are usually not the responsible party, and can shift the judgment to the party responsible for the harm—the manufacturer.[16] This was recognized by one court in an action based on warranty.

> It is not unusual for liability to move transactionally up the chain of distribution until the manufacturer ultimately pays for its breach of its implied warranty of merchantability to the distributor to whom it initially sold the goods.[17]

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[13] *E.g., Canifax* v. *Hercules Powder Co.,* 237 Cal. App. 2d 44, 46 Cal. Rptr. 552 (1965); *Dunham* v. *Vaughan & Bushnell Mfg. Co.,* 42 Ill. 2d 339, 247 N.E. 2d 401 (1969); *McKisson* v. *Sales Affiliates, Inc.,* 416 S.W. 2d 787 (Tex. 1967). *See generally* Leete, "Products Liability for Nonmanufacturer Product Sellers: Is It Time to Draw the Line?" 17 The Forum 1250 (1982).

[14] *Vandermark* v. *Ford Motor Co.,* 61 Cal. 2d 256, 391 P. 2d 168, 171, 37 Cal. Rptr. 896 (1964).

[15] Insurance Services Office, "Product Liability Closed Claim Survey" 35 (1977) (hereinafter "ISO Survey").

[16] E.g., *Hales* v. *Monroe,* 544 F.2d 331 (8th Cir. 1976); *Fairburn* v. *Montgomery Ward & Co.,* 349 So. 2d 1280 (La. App. 1977); *Anderson* v. *Somberg,* 158 N.J. Super. 384, 386 A. 2d 413 (1978).

[17] *Kelly* v. *Hanscom Bros., Inc.,* 231 Pa. Super. 357, 331 A. 2d 737, 740 (1974).

Even though the product seller often has a basis for indemnification or contribution from the manufacturer of the product, the costs of defending a product liability suit are burdensome and a waste of legal resources.[18] Similarly, the costs to insure potential liabilities over which the seller has no control are high. These costs are added to the price of products and are passed on to consumers.

A number of State statutes, like section 8, adopt a fair solution to these problems by providing that product sellers are liable only for harms caused by their own conduct.[19] In the event that the manufacturer responsible for the harm is not subject to service of process, or the court finds that the claimant would be unable to enforce a judgment against the manufacturer, however, the act provides the claimant with a source of recovery by treating the product seller as the manufacturer.

As reported

Subsection (A) identifies the two situations in which a product seller [20] is liable. First, a product seller is responsible if the claimant proves by a preponderance of the evidence that (1) the individual product unit which caused the harm was sold by the product seller, (2) the product seller failed to exercise reasonable care with respect to the product, and (3) that failure was a proximate cause of the harm. Under this reasonableness standard, a product seller is responsible only for harms caused by its own conduct.

The negligence or fault-based standard of conduct focuses on the individual factors of each claim. Although subsection 8(d) provides some guidance on factors relevent to whether the seller exercised reasonable care, such as the conduct of the seller with respect to the construction, inspection, or condition of the product, or its failure to transmit adequate warnings or instructions, the act does not presume to list all the considerations which may be relevant in a given case.

Second, subsection 8(a) provides that a product seller is strictly liable for a breach of its own express warranty if that breach caused the claimant's harm. The rationale for this strict liability standard is the same as that discussed with regard to section 7, above.

By adhering to the concept of individual responsibility, this subsection promotes product safety. Where a product seller is responsible only for harms it causes, either by its negligence or by breach of its own express warranty, it has the opportunity and incentive to avoid that conduct and to prevent harms.

By eliminating the broad exposure of product sellers to strict liability for product-related harms caused by manufacturers, the act also eliminates the need for and expense of contribution and indemnification suits by product sellers against the manufacturers who actually caused the harm. Claimants, in addition, will be assured recovery for product-related harms if the manufacturer is unavailable for service or the claimant would be unable to enforce a judgment against it; under subsection (e) a product seller may be held liable in such instances as if it were the manufacturer. All parties will benefit by the costs saved as a result of this provision.

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[18] Statistics show that for every dollar of claims paid an average of 42 cents is spent in defense costs. "ISO Survey," supra note 75, at 11.

[19] e.g., Wash. Rev. Code § 7.72.040 (Supp. 1982).

[20] A product seller may fall within the Act's definition of manufacturer in Subsection 2(6). In that event, the product seller is subject to the standards of responsibility applicable to the manufacturers. See §§ 4 to 7.

Subsection (b) requires sufficient evidence of such element of a claim against a product seller before the claimant's case can reach the trier of fact. See discussion of section 4(b), above.

Subsection (c) limits the use of offensive and defensive collateral estoppel in cases against a product seller. This provision is identical to that provided for cases against a manufacturer. See discussion of section 4(c), above.

Subsection (d) sets forth some factors which may be relevant to determining whether the product seller failed to exercise reasonable care. It provides also that a product seller is not liable where there was no reasonable opportunity to inspect the product in a manner that would or reasonably should have revealed the aspect of the product that rendered it unreasonably dangerous. For example if a product seller has no reasonable opportunity to find the defect because the product is prepackaged,[21] or because the product never passed through its control,[22] that product seller would not be responsible.

Subsection (e) provides that a product seller may be treated as a manufacturer and held responsible as if it were the product manufacturer in two situations: (1) where the responsible manufacturer is not subject to service of process, or (2) where a court determines that the judgment against the responsible manufacturer is unenforceable. To recover from a product seller under this provision, a claimant must prove the elements of a claim against a manufacturer (see secs. 4 to 7), and must either show that the manufacturer cannot be served or obtain a court determination that a judgment against the manufacturer would be unenforceable, for example, where the manufacturer is insolvent.

Although this subsection departs from the notion of individual responsibility for harms, it ensures that a claimant unable to recover from the manufacturer responsible for the harm can recover from the product seller. This satisifies the public policy of compensating an injured claimant for a harm caused by an unreasonably dangerous product.

SECTION 9.—COMPARATIVE RESPONSIBILITY

1. In general

Section 9 provides that product liability claims are governed by principles of pure comparative responsibility. The claimant is permitted to recover from a defendant manufacturer or product seller the amount of damages for which that defendant is responsible. Thus, the manufacturer or product seller pays only for the harms for which it is responsible, except when all or a portion of a judgment against a co-defendant joint tortfeasor is not collectable. In that event, the act Permits reallocation of the uncollectable amount among the remaining joint tortfeasors, according to their respective percentages of responsibility for the harm. The act does not alter the basic common law rules and concepts of joint and several liability; it merely modifies the procedures for allocating damages.

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[21] See Ky. Rev. Stat. § 411.340 (Supp. 1980); Tenn. Code § 29-28-106 (1980).

[22] *Cf. Kirby* v. *Rouselle Corp.*, 108 Misc. 2d 291, 437 N.Y.S.2d 512 (1981) (distributor held liable in strict liability for product defects although the product had been shipped directly from the manufacturer to the buyer).

Present law

By 1981, 37 States and Puerto Rico and the Virgin Islands had adopted by statute or case law one of several approaches to the concept of comparative responsibility.[23] Some jurisdictions have a form of modified comparative responsibility, which may totally bar a claimant from recovering damages if the claimant's contribution to his own harm was greater than the defendant's contribution, or greater than 50 percent.[24]

At least 11 States [25] and some Federal statutes [26] have adopted pure comparative negligence. Pure comparative negligence allows recovery from a party if that party was, to some extent, responsible for the harm. Thus, this theory is considerably more favorable to claimants that the modified comparative negligence approach.

The fairness of pure comparative responsibility is widely recognized.[27] It has been considered appropriate in product liability cases by both State legislatures [28] and courts.[29] Although some have expressed concern that there are problems in applying comparative responsibility in strict liability actions,[30] the Committee believes that extending pure comparative fault principles to all product liability claims results in a sensible and fair method of compensation.

As reported

Subsection (a) states the guiding principle that all claims under the act are governed by comparative responsibility. To dispel any doubt about whether the act follows the pure or modified comparative responsibility approach, the subsection states that conduct of the claimant shall not bar recovery in a product liability action, but shall merely reduce the damages awarded to the claimant in an amount proportionate to the claimant's responsibility.

Subsection (b) sets forth the steps for determining the proper judgment against a defendant manufacturer or product seller. First, the jury or, if there is no jury, the court must specifically state the total dollar damages the claimant suffered without regard to comparative responsibility principles. Second, the jury or the court must specifically determine the percentage of responsibility for the claimant's damage allocable to each defendant, to each third-party defendant, and to any conduct described in section 10.[31]

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[23] V. Schwartz, "Comparative Negligence," § 1.1 (1974 & Cumm. Supp. 1981).

[24] E.g., Ark. Stat. Ann. § 27-1765 (1979); Kan. Stat. Ann. § 60-258a (1963); S.D. Comp. Law § 20-9-2 (1979). See also *Sandford* v. *Chevrolet Div. of General Motors Co.*, 52 Or. App. 579, 629 P.2d 407 (1981), aff'd, 292 Or. 590, 642 P.2d 624 (1982).

[25] See Schwartz, supra note 84, at App. A (citing comparative negligence systems of general application in the United States).

[26] E.g., Federal Employers' Liability Act, 45 U.S.C. § 53 (1976).

[27] E.g., Unif. Comparative Fault Act § 1 and Prefatory Note, 12 U.L.A. 33 (Supp. 1982).

[28] E.g., Mich. Stat. Ann. § 27A.2949 (Supp. 1982).

[29] E.g., *Busch* v. *Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977); *Daly* v. *General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

[30] E.g., *Kirkland* v. *General Motors Corp.*, 521 P.2d 1353 (Okla. 1974). See generally Annot., 9 A.L.R. 4th 633 (1981).

Where two or more persons are determined to be joint tortfeasors, the trier of fact will allocate responsibility for the harm among them in proportion to their respective percentages of responsiblity in order to determine the judgments to be entered under subsection 9(c). Thus, the act provides that separate judgments be entered against each defendant determined to be jointly liable according to its percentage of responsibility.

Subsection (c) provides that the judgment against each party determined to be responsible for a portion of the claimant's harm shall be entered by the court. Except as otherwise provided in the act, that judgment will reflect the concept of individual responsibility, because the defendant will be liable only for the amount of dollar damages for which it is responsible. Subsection 11(a) (relating to workplace injuries) may, however, require a different method of calculating the judgment.

Subsection (d) provides that where the claimant is unable to collect a judgment from a joint tortfeasor, and makes a motion to the court within 1 year of that judgment, the court will reallocate the uncollectable amount proportionally among the other responsible parties and the claimant, if the claimant was partly responsible for the harm.[32]

The following hypothetical illustrates this point. The claimant incurs damages of $100. The claimant is found to be 30 percent responsible for the damage. The defendants are joint tortfeasors. Defendant A is 30 percent responsible and defendant B, 40 percent responsible. Under subsection 9(c), the court will enter a judgment against defendant A equal to $30 and against defendant B equal to $40. If the court finds that the $40 is uncollectable from B, that amount will be reallocated proportionately to the claimant and to defendant A. Because the claimant and defendant A are each responsible for the same amount of damage, 30 percent, they share the uncollectable $40 amount equally.[33] Thus, defendant A pays $50, equal to his $30 judgment and half of the $40 judgment entered against defendant B.

SECTION 10.—MISUSE, ALTERATION, CONTRIBUTORY NEGLIGENCE OR ASSUMPTION OF THE RISK

1. In general

Section 10 together with section 9 ensures that the principles of comparative responsibility apply in all product liability actions. Section 10 provides that the judgment against a manufacturer or product seller shall reflect a reduction of damages proportionate to the extent that the conduct of others or of the claimant caused the claimant's harm. Section 10 defines the types of conduct, such as product misuse or alteration, assumption of risk, or contributory negligence, that give rise to this proportionate reduction.

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[31] Similar findings are required by some state product liability statutes. E.g., Hawaii Rev. Stat. § 663-31 (1976).

[32] See Minn. Stat. § 604.02 (Supp. 1982).

[33] If the claimant was only 10 percent responsible and defendant A, 50 percent responsible, the uncollectable $40 would be shared by the claimant and defendant A in a ratio of 1:5.

2. Present law

The vast majority of States recognize that, to one degree or another, product misuse and alteration, assumption of risk, and contributory negligence affect the right or amount of recovery in a product liability action. The States differ, however, on whether and under which legal theories this conduct is a complete bar to recovery or simply a basis for reducing the judgment. For example, some States do not recognize contributory negligence as a defense to product liability actions. Other States provide that contributory negligence is a complete bar to recovery. Others provide that it reduces the judgment proportionately.

Because the act adopts pure comparative responsibility and merges all legal theories of recovery into a single cause of action, it avoids the current vagaries of State law. The claimant recovers from the defendant the amount of damages for which that defendant is responsible. The result is fair to both the claimant and to the defendant manufacturer or product seller.

Section 10 is supported by case law and statutes regarding the types of conduct that constitute misuse, alteration, or other conduct that is a basis for allocating responsibility.

As reported

Subsection (a) deals with misuse of the product by a person other than the defendant and other than the claimant. Where misuse by a third-party causes some or all of the claimant's harm, subsection (a) requires that the allocation of responsibility for which subsection 9(b) provides reflect the percentage of total responsibility attributable to such misuse. If subsection 11(a) applies, however, a different result may be reached.

The definition of misuse in subsection (a) follows existing law. First, misuse occurs when a product is used for a purpose or in a manner not consistent with the warnings or instructions available to the product user. The "Restatement (Second) of Torts" recognizes this principle, stating that a product seller may reasonably assume that warnings given with a product will be read and heeded.[34] Case law and State statutes also follow this definition, both with regard to misuse by a third party and misuse by the claimant.[35]

Second, misuse is considered to occur when a product is used for a purpose or in a manner not consistent with reasonable practice of users of the product. This more general statement of misuse is also recognized in the "Restatement (Second) of Torts," which provides that a product seller is not reasonable if the injury results from abnormal handling of the product.[36] Reference to what was a "reasonable practice" of users incorporates the principle of what was normal or expected, without also incorporating the pitfalls of the "foreseeability" concept.[37]

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[34] "Restatement (Second) of Torts" at § 402A comment j.

[35] E.g., *Chisholm* v. *J. R. Simplot Co.*, 94 Idaho 628, 495 P.2d 1113 (1972); Ariz. Rev. Stat. § 12-683(3) (1982); Ind. Code Ann. § 34-4-20A-4 (Supp. 1980).

[36] "Restatement (Second) of Torts" at § 402A comment h.

[37] See, e.g., *Venezia* v. *Miller Brewing Co.*, 626 F. 2d 188 (1st Cir. 1980); *Green* v. *Volkswagen of America, Inc.*, 485 F. 2d 430, 438 (6th Cir. 1973). See also Unif. Product Liability Act § 102(G), Analysis, 44 FR at 62719-20.

Finally, misuse occurs when a product user fails to train another [38] or otherwise provide for the safe use of the product, and that failure is a cause of the claimant's harm. If, for example, an employer or fellow employee fails to check the safe assembly of scaffolding,[39] or a municipality misrepairs a product,[40] and such conduct causes an injury, the manufacturer or product seller may be found not responsible for that injury.

Subsection (b) deals with alteration or modification of the product by a person other than the defendant and other than the claimant.[41] Where an alteration or modification by another causes some or all of the claimant's harm, Subsection (b) requires that the subsection 9(b) allocation of responsibility reflect the percentage of total responsibility attributable to such alteration or modification. Again, section 11(a) may require a different result.

Subsection 10(b)(1) does not apply if the alteration or modification was in accord with the instruction, specification, or express consent of the manufacturer or product seller, or was reasonably anticipated conduct about which the manufacturer or product seller failed to warn or instruct. Where the defendant has suggested or approved the alteration or modification, it cannot avoid responsibility for the consequences.[42] Where the defendant knows or shoud have known that the alteration or modification was reasonably anticipated conduct, it has a duty to provide warnings against the dangers of that conduct.[43]

Subsection (b)(2) defines alterations or modifications that trigger a reallocation under subsection 9(b). First, such conduct occurs when a person other than the defendant changes the design, construction, or formulation of the product, or changes or removes warnings, instructions, or safety devices.[44] Such "mishandling" of the product is recognized as a defense in the "Restatement (Second) of Torts," which provides that a defendant is responsible for harm caused by the product only if the product reaches the user or consumer "without substantial change in the condition in which it is sold." [45]

Second, an alteration or modification occurs when a product user fails to observe the necessary routine care and maintenance of a product, and that failure causes the harm.[46] However, ordinary wear and tear is not included in the definition of modification or alteration.

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[38] Data show that 24 percent of employee injuries compensated involved a worker with 6 months or less experience on the job at the time of the occurrence. "ISO Survey," supra note 75, at 17 and 165.

[39] *Builders Shoring and Scaffolding Equip. Co.* v. *Schmidt*, Prod. Liab. Rep. (CCH) ¶9255 (Fla. App. 1982).

[40] *Page* v. *Barko Hydraulics*, 673 F. 2d 134 (5th Cir. 1982).

[41] It is estimated that product modifications occur in over 12 percent of product liability cases, and that 39 percent of these result from conduct by the employers. See "ISO Survey," supra note 75, at 140–41.

[42] E.g., N. H. Rev. Stat. Ann. § 507-D:3 (Supp. 1979).

[43] See Unif. Product Liability Act § 112(D), Analysis, 44 Fed. Reg. at 62739.

[44] E.g., *Hanlon* v. *Cyril Bath Co.*, 541 F.2d 343 (3d Cir. 1975); *McGrath* v. *Wallace Murray Corp.*, 496 F.2d 299 (10th Cir. 1974); *Kuziw* v. *Lake Eng'g Co.*, 438 F. Supp. 554 (N.D. Ill. 1977); *Talley* v. *City Tank Corp.*, 158 Ga. App. 130, 279 S.E.2d 264 (1981); *DeArmond* v. *Hoover Ball & Bearing*, 86 Ill. App. 3d 1066, 408 N.E.2d 771 (1980).

[45] "Restatement (Second) of Torts" at § 402A(1)(b).

[46] E.g., *Savage* v. *Jacobson Mfg. Co.*, 396 So.2d 731 (Fla. App.), cert. denied, 402 So.2d 612 (Fla. 1981).

Subsection (c) addresses conduct by the claimant that causes some or all of the claimant's harm. This subsection requires that the subsection 9(b) allocation of responsibility reflect the claimant's percentage of responsibility for the harm. This allocation, like those in subsections (a) and (b) of section 10, may not be necessary if subsection 11(a) applies.

Subsection (c) defines the types of conduct by the claimant that should be reflected in the subsection 9(b) allocation of responsibility. The allocation should reflect that the claimant, while using the product, was injured by a defective condition of the product that would have been apparent, without inspection, to an ordinary reasonably prudent person. The focus is not on what the claimant actually knew, but on what an ordinary reasonable person would have known.[47] The act departs from the "all or nothing approach" used by States that apply contributory negligence as a total bar to recovery. The result favors the claimant and permits allocation of responsibility between the claimant and the defendant or defendants.

Second, the subsection 9(b) allocation should reflect the fact that the claimant knew about the product's defective condition and voluntarily used the product or assumed the risk of harm. The inquiry is subjective, focusing on what the claimant himself knew and understood about the risk of harm.[48] In making that determination, a trier of fact may consider a wide range of factors, including, for example, the claimant's age and experience and the obviousness of the defect. This is the traditional assumption of the risk defense [49] which, as applied under the act's comparative responsibility principle, favors the claimant and avoids the prohibitive "all or nothing" rule of some States.

Finally, if the claimant himself misuses, alters, or modifies the product, as those terms are defined in subsections 10(a) and (b), a proportionate reduction in the judgment shall be made.[50]

SECTION 11.—EFFECT OF WORKERS' COMPENSATION

In general

Section 11 describes the interaction between the workers' compensation system and the product liability tort litigation system. The two systems interact where an employee, covered by a workers' compensation statute,[51] is injured in the workplace [52] and has a product liability claim for those injuries. Currently, the interaction of the systems results in efforts to shift costs from those who pay workers' compensation benefits to those who pay product liability damages. The interaction and cost-shifting creates excessive legal costs, and creates problems for both the product liability and the workers' compensation systems. This section addresses those problems solely as they relate to product liability. No attempt is made to affect purely workers' compensation issues, that is, the benefits due an injured employee or the obligations or employers under workers' compensation laws.

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[47] See, e.g., *Auburn Mach. Works Co.* v. *Jones*, 366 So.2d 1167 (Fla. 1979); *Rose* v. *Herring Tractor & Truck Co.*, 47 N.C. App. 643, 267 S.E.2d 717 (1980).

[48] Distinguishing between contributory negligence and assumption of risk, see Prosser, supra note 30, at 441 ("[A]ssumption of risk is a matter of knowledge of the danger and intelligent acquiesence in it, while contributory negligence is a matter of some fault or departure from the standard of conduct of the reasonable man. . . .").

[49] E.g. *Colson* v. *Allied Prods. Corp.*, 640 F.2d 5 (5th Cir. 1981); *Moran* v. *Raymond Corp.*, 484 F.2d 1008 (7th Cir. 1973), cert. denied, 415 U.S. 932 (1974); *Vargus* v. *Pitman Mfg. Co.*, 510 F. Supp. 116 (E.D. Pa.), *aff'd*, 673 F.2d 1301 (3d Cir. 1981); *Capps* v. *McCarley & Co.*, 260 Ark. 839, 544 S.W.2d 850 (1976). See also "Restatement (Second) of Torts" at §§ 496A, 496D comment c.

[50] E.g., Idaho Code § 6–1405(4)(b) (Supp. 1982); *Haines* v. *Powermatic Houdaille, Inc.*, 661 F.2d 94 (8th Cir. 1981).

[51] As of 1974, more than 87 percent of the labor force in the United States was coverd by workers' compensation laws. J. Chelius, "Workplace Safety and Health: The Role or Workers' Compensation," 20 (1977).

[52] Approximately 11 percent of those receiving product liability payments for bodily injuries are employees injured in the course of employment. This 11 percent, however, accounts for 42 percent of the dollars paid. See "ISO Survey," supra note 75, at 78, Figure 9-1.

Section 11 minimizes litigation transaction costs by keeping the workers' compensation system and the product liability tort system separate under the act. The result is fair to all parties: (1) employers are responsible only for workers' compensation obligations for workplace injuries and cannot usually shift those obligations to the manufacturer or product seller; (2) manufacturers or product sellers pay only the damages for which they are responsible and cannot shift those damages to an employer who is obligated to pay workers' compensation benefits; and (3) injured employees recover fully through workers' compensation benefits and the product liability judgment.

Present law

Workers' compensation statutes are intended to guarantee an employee injured in the course of employment a fast and inexpensive recovery of benefits regardless of who, if anyone, was at fault in causing the injury. In exchange for automatic no-fault payment of benefits, the employer is immune from tort liability for the injury. Workers' compensation is designed to be the employee's sole and exclusive remedy against the employer for work-related injuries.[53]

The product liability tort litigation system, by contrast, is traditionally fault-based, requiring a manufacturer or product seller to pay for harms it has caused. Recent case law suggests that fault-based principles of the tort system are being interjected into the no-fault workers' compensation system as the parties attempt to shift costs between the two systems.

The employer's immunity to tort liability has been eroded. This has occured in two ways. First, although workers' compensation statutes are premised on the concept that the employer automatically pay workers' compensation benefits in exchange for immunity from tort suits, employees have sued their employers in tort by alleging that the employer acted in a "dual capacity," for example, as employer and manufacturer of the product that injured the employee. In this" dual capacity," the employer has been held liable in tort to the employee.[54]

Second, the employer's immunity has been eroded in suits by manufacturers or product sellers in contribution or indemnity seeking to recover all or part of a product liability judgment from a negligent employer.[55] These cases create high transaction costs and permit in essence what workers' compensation statutes are intended to prohibit—a suit against the employer. Although employer negligence is estimated to be involved in over half of employees' product-related suits,[56] most jurisdictions do not allow contribution suits by a manufacturer against an employer, on the theory that contribution defeats the "exclusive remedy/employer immunity" concept.[57] Section 11 adopts the majority rule which maintains this fundamental principle of workers' compensation.

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[53] 2A A. Larson, "The Law of Workmen's Compensation," §65.10 (1982). See *Kofron* v. *Amoco Chem. Corp.*, 441 A.2d 226 (Del. 1982).

[54] E.g., *Bell* v. *Industrial Vangas, Inc.*, 30 Cal. 3d 268, 179 Cal. Rptr. 30, 637 P.2d 266 (1981); *Mercer* v. *Uniroyal, Inc.*, 49 Ohio app. 2d 279, 361 N.E.2d 492 (1970). *Contra Provo* v. *Bunker Hill Co.*, 393 F. Supp. 778, 787 (D. Idaho 1975) ("The duty of an employer to provide safe machinery . . . does not lend itself to an interpretation that such obligation is really two legal duties.").

In most States, the employer is permitted to recover the amount of workers' compensation benefits paid from a responsible manufacturer or product seller under the doctrine of subrogation. The employer, having paid the employee for all or part of the employee's losses, acquires some or all of the employee's rights to recover from the manufacturer or product seller.

Although it is widely used, the subrogation lien in the area of product liability is an expensive cost-shifting device that creates problems by mixing fault and no-fault systems. The bargain struck by workers' compensation is that the employer automatically pays the benefits regardless of fault in return for immunity from further liability. With the right of subrogation, however, the employer can shift a workers' compensation payment onto the product liability tort system. Section 11 eliminates this cost-shifting process, and keeps the product liability system from paying for a cost tht is inherent in workers' compensation.

As reported

Subsection (a) specifies how product liability judgments are calculated for workplace injuries that are also compensated by workers' compensation. The calculation ensures that an injured employee does not obtain double recovery through workers' compensation benefits and a product liability judgment. If the amount of workers' compensation benefits is greater than the dollar amount of damage caused by section 10 conduct, there is a potential for excessive recovery by the claimant.[58] Subsection (a) avoids double recovery by providing, in that situation, that the judgment against the defendant shall be calculated by subtracting the total amount of workers' compensation benefits from the claimant's total damages, as those damages are determined under subsection 9(b).

This approach can be illustrated by the following example. Assume that the claimant sustains $100 in damages in a workplace accident. The claimant is entitled to $60 in workers' compensation benefits. The defendant manufacturer is 50 percent responsible for the harm; conduct of third parties and/or the claimant is determined under section 10 to have caused the remaining 50 percent of the harm. If the claimant receives both workers' compensation benefits of $60 and a $50 product liability judgment from the defendant, he collects $110, or more than the $100 damage suffered.

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[55] E.g., *Skinner* v. *Reed-Prentice Div.*, 70 Ill. 2d 1, 374 N.E.2d 437 (1977), cert. denied, 436 U.S. 946 (1978); *Lambertson* v. *Cincinnati Corp.*, 312 Minn. 114, 257 N.W.2d 679 (1977); *Dole* v. *Dow Chem. Co.*, 130 N.Y. 2d 143, 331 N.Y.S. 2d 382, 282 N.E.2d 288 (1972).

[56] "ISO Survey," supra note 75, at 81.

[57] E.g., *Union Carbide Corp.* v. *Dunn Bros. Gen. Contractors, Inc.*, 294 F. Supp. 704 (M.D. Tenn. 1968); *Jack Morgan Constr. Co.* v. *Larkan*, 254 Ark. 838, 496 S.W.2d 431 (1973).

[58] If the amount of benefits is less than that allocated to section 10 conduct, however, the calculation set forth in subsection 11(a) is not triggered. Thus, under section 9, the injured employee would be entitled to the full amount of worker compensation benefits and a product liability judgment against the manufacturer or product seller equal to the dollar amount or damage caused by the defendant.

To prevent this "double" recovery, subsection (a) requires that, because the workers' compensation amount, $60, is greater than the amount attributable to conduct of others, $50, the product liability judgment against the defendant is determined by subtracting the workers' compensation amount from the claimant's total damages. The defendant's percent of responsibility is not relevant. Thus, under this hypothetical, the claimant would receive $60 of workers' compensation benefits and would recover the remaining amount of the $100 damage in the judgment against the manufacturer—a judgment of $40.[59]

The result under section 11 is fair to all parties. The claimant recovers through workers' compensation and the product liability tort judgment all his damages, but no more. The employer pays workers' compensation, no more and no less. The manufacturer or product seller pays an amount not greater than the amount of damages it caused. This prevents excessive recovery by the claimant and, at the same time, maintains the integrity of the workers' compensation system.

In addition to setting forth a system to prevent double recovery, subsection (a) provides that if a workers' compensation benefit claim has not been filed or if the remedies under the applicable statute have not been exhausted, the product liability claim shall be dismissed without prejudice. This provision ensures that the trier of fact in a product liability action remains uninvolved in the determination of the workers' compensation claim. In addition, the last sentence of subsection (a) states that the determination of workers' compensation benefits in a product liability action is not binding or admissible in any other proceeding. The integrity of the two systems is, thus, maintained by minimizing their interaction.

Subsection (b) eliminates the employer's subrogation lien. It is generally accepted that, having paid the injured employee for some or all of its damages, an employer or its workers' compensation insurance carrier assumes or is subrogated to some or all of the employee's rights against a manufacturer. Under subsection (b), the employer and its workers' compensation insurance carrier are barred from pursuing subrogation rights, unless the manufacturer or product seller has expressly agreed to hold the employer harmless.

The bar against subrogation does not affect the total amount recovered by the employee. It merely ensures that the costs of the workers' compensation system are borne by the employer and are not shifted to the product liability tort litigation system.

Most employers and insurers endorse this change in current practice for several reasons.[60] First, the provision will eliminate the legal costs associated with pursuing a subrogation claim. Second, section 11, as a whole, guarantees employer immunity as was intended by workers' compensation statutes. This fact balances the employer's loss of the subrogation lien. The employer is responsible solely for workers' compensation benefits and no more. In exchange for reinforcing the workers' compensation principle of employer immunity, subsection 11(b) requires that the employer pay, without shifting, the workers' compensation amount.

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[59] If there are multiple defendants, the $40 will be paid by them in proportion to their individual percentages of responsibility for the claimant's harm, as those percentages are determined under subsection 9(b).

[60] See for example "*Product Liability Reform: Hearings Before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation*", 97th Cong., 2d Sess. 346–47 (1982).

Subsection (c) eliminates contribution and indemnity suits under which a minority of jurisdictions allow a third-party tortfeasor, such as a manufacturer or product seller, to sue a negligent employer to recover from it all or part of a product liability judgment.[61] Through such suits, a manufacturer is permitted to do that which the injured employee cannot do—sue the employer is tort. The result is contrary to the workers' compensation principle of employer immunity from tort liability.

Under the act, however, a manufacturer or product seller will not pay for harms caused by others, and therefore will have no incentive to attempt to shift its liabilities. Because the judgment against the manufacturer will be no greater than the damages it has caused, the bar to contribution and indemnity suits is appropriate.

Elimination of contribution and indemnity suits maintains the integrity of the workers' compensation system with a result that is fair to all parties. The employer is guaranteed immunity and, therefore, is not liable beyond its workers' compensation obligation. The manufacturer is required to pay the judgment rendered against it without shifting any part to the employer. Because subsections (b) and (c) together prohibit employers and manufacturers from suing each other to offset their liabilities, litigation costs will be reduced. All this is accomplished without affecting the interests or rights of the injured employee.

Subsection (d) prevents an injured employee entitled to workers' compensation benefits, or one eligible to file for benefits on his behalf, from bringing any action other than a workers' compensation insurance action against the employer, the workers' compensation insurance carrier, or a coemployee. This provision follows the overwhelming majority rule and ensures a fundamental concept of workers' compensation: employer immunity from tort suits by the employee.

The Committee believes that each provision of section 11 is essential to achieving the fair and equitable interaction of the workers' compensation and product liability systems. Together, the subsections ensure that the employer pays only workers' compensation benefits; it cannot shift those costs to another, and it is protected from potential liability to employees of manufacturers. The manufacturer pays a product liability judgment which never exceeds its share of responsibility for the harm, and is prohibited from recovering part of that payment from the employer. The employee recovers both workers' compensation and product liability awards, but does not receive double recovery for a harm. As a result, section 11 eliminates the transaction costs associated with suits to shift costs between the two systems.

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[61] See cases cited supra footnote 55.

SECTION 12.—TIME LIMITATION ON LIABILITY

1. In general

Section 12 establishes a 25-year time limitation on liability for claims based on harms caused by capital goods which are allegedly unsafe in design or formulation, or harms caused by failure to give adequate warnings or instructions. A time limitation on liability establishes the time during which a manufacturer has an obligation with respect to harms caused by the product. Harms occurring after the stated time do not constitute breaches of that obligation and, therefore, do not give rise to an actionable harm. There are, however, some exceptions to this time limitation on liability.

Existing data show that most claims for harms caused by older products involve capital goods. The rationale for the provision is that manufacturers of capital goods, which can have a long life, should not be exposed to liability for harms caused by those products for a potentially unlimited time. Establishment of an outside time limit on liability recognizes that claims brought at an unreasonably late date after initial delivery place an unwarranted burden on trade, represent a wasteful use of judicial resources, and are unfair to manufacturers, product sellers, and consumers alike. The Committee has not established a time limitation for noncapital goods nor has it established a statute of limitations for product liability actions. Thus, these issues are left to existing state law.

2. Present law

As of January 1982, 22 States had adopted a time limitation for product liability actions.[62] These States have, apparently, recognized the adverse effects of the so-called "long-tail" problem. Although a manufacturer is responsible for dramatically fewer claims as a product gets older, claims may be made potentially forever. A time limitation cuts off the "long-tail" of liability and its attendant problems. One recent commentary described those problems.[63]

> First, it may be difficult to "cost in" tort liability over a period of 10, 20, 30 or more years, given the uncertainties of future economic developments with their effects on damages, to say nothing of the uncertainties of the legal standards that will be applied. Second, the manufacturers most consistently exposed to these risks are those producing capital goods, such as industrial machinery. These manufacturers sell relatively few products, and, therefore, may be less able to "pass through" the costs in the price of new machines. Third, if they do attempt to pass the costs through to customers, older producers, with liability exposure from units already in place, would be at a substantial competitive disadvantage compared to new entrants into

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[62] Martin, "A Statute of Repose for Product Liability Claims," 50 Fordham L. Rev. 745, 750 (1982). A few state time limitation statutes have been held violative of state constitutions, which guarantee redress in court for any injury. E.g., *Lankford* v. *Sullivan, Long & Hagerty,* 416 So.2d 996 (Ala. 1982).

[63] Martin, supra note 123, at 747–48 (footnotes omitted).

> the market. Fourth, regardless of what the law may be, there are substantial risks in trying cases involving older products. For example, there is a greater chance that the product has been subjected to a modification or misuse that the jury will say the manufacturer should have foreseen; there is also an increased risk that the jury, no matter how instructed will use a hindsight perspective rather than evaluate the product by the state of the art at the time it was produced. Finally, even if a manufacturer of an older product is able to prevail on the merits at trial, the investigation and processing of claims is an expensive procedure, and the expense is greater when witnesses and records are difficult to obtain or have long since disappeared.

The Committee believes that a time limitation for capital goods should alleviate these problems and that the period of time provided in the act—25 years—is sufficiently long to be fair to claimants. The certainty as to liability exposure will lead to savings in transaction costs and, possibly, insurance costs.[64]

As reported

Subsection (a) provides that no claim alleging unsafe design or formulation or failure to give adequate warnings or introductions may be brought for harms caused by a capital good more than 25 years from the date the product was delivered to its first purchaser or lessee who was not engaged in a business to sell or lease the product or to use the product as a component part. "Capital good" is defined as any product other than a motor vehicle or any component part of such a product which is both depreciable under the Internal Revenue Code of 1954, as amended, and (1) used in a trade or business, or (2) held for production of income, or (3) sold, leased, or donated to a governmental or private entity for the production of goods, for training, for demonstration, or for similar purposes.

The time limitation applies only to capital goods because the "long-tail" problem is most severe for capital goods which have a longer life than consumer goods. By limiting the time limitation to capital goods, the Committee believes that very few claimants will go totally uncompensated for harms. Most capital goods injuries occur in the workplace.[65] Because nearly 90 percent of the U.S. labor force is covered by a worker compensation statute,[66] those injured after the 25-year period will recover worker compensation benefits.

Section 12 establishes a 25-year outside time limitation. Most state statutes are considerably shorter than 25 years, however, averaging about 10 years.[67] Many commentators have advocated that the act follow State law and adopt a shorter period,[68] arguing that too long a period is ineffective in resolving the "long-tail" problems. Although the Committee has adopted a 25-year period in the act, a number of witnesses testified that a shorter time limit would better serve the objectives of this provision.

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[64] There is evidence that older claims and the fear of older claims have a "disproportionate effect" when insurance rates are established. Id. at 756, citing Interagency Task Force on Product Liability, U.S. Department of Commerce, Final Report of the Insurance Study by McKinsey & Co. 4–92 (1977).

[65] Martin, supra note 123, at 757.

[66] Chelius, supra note 112.

[67] E.g., Neb. Rev. Stat. § 25–224 (1979).

[68] E.g., Interagency Task Force on Product Liability, U.S. Department of Commerce, Final Report VII–28 to 29 (1977) (recommending a 10-year period for workplace goods).

The 25-year period is measured from the date of delivery of the product from the manufacturer or product seller. This is a period that can be measured with certainty, unlike a period that expires at the end of the product's "useful life." The Committee believes that a time limitation is meaningful only if it is definite, and that litigation over when the period begins and ends should be minimized.

Moreover, a presumptive time limitation on claims providing merely that a harm occurring after the stated period is presumed not to give rise to an actionable harm, does not provide a meaningful remedy for the "long-tail" problem. Under such a rebuttable presumption, claims for harms caused by 25-year-old products would continue to be brought with the problems and costs described above. The Committee believes that a presumptive period that reduces but does not eliminate the manufacturer's or seller's exposure in cases involving very old products would not adequately advance the Committee's objective. As one court said in endorsing the policy of a time limitation, people should be allowed, "after the lapse of a reasonable time, to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown potential liability. . . ."[69]

The time limitation on liability applies only to design or formulation defect cases and to warning or instruction defect cases. It is inappropriate to extend the time limitation period to cases alleging a manufacturing or construction defect or to cases alleging breach of express warranty because a manufacturer is strictly responsible for harms occurring in those cases. The concept of strict responsibility is inconsistent with the principle of a time limitation.

Subsection (b) states three situations in which the act's time limitation does not apply. First, the provision does not apply if the manufacturer or product seller intentionally misrepresented facts or fraudulently concealed information about the product, and that conduct was a substantial cause of the harm. Second, the time limitation does not apply if the harm was the result of the cumulative effect of prolonged exposure to a defective product. Third, the time limitation does not apply if the harm was caused within the 25-year period, but did not manifest itself until after the period expired, as in the case of a latent harm.

Subsection (c) provides that the time limitation does not affect the right of any person to seek contribution or indemnification from the person actually responsible for the harm.[70]

SECTION 13.—PUNITIVE DAMAGES

In general

Section 13 states the standard for awarding punitive damages and the factors a trier of fact must consider in determining when a manufacturer or product seller is liable for punitive damages in a product liability action. If the trier of fact awards punitive damages, section 13 states that the court must determine the amount of punitive damages. The Committee believes that the standards set forth in section 13 and the requirement that the court determine the amount of punitive damages will ensure that punitive damages are assessed fairly in product liability actions.

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[69] *Johnson* v. *Star Machinery Co.*, 530 P.2d 53, 56 (Or. 1974).

[70] See Unif. Product Liability Act, § 110(B)(2)(C), 44 Fed. Reg. at 62732–33.

Present law

Punitive or exemplary damages are designed both to punish a defendant for outrageous conduct and to deter any such conduct in the future by the defendant and others.[71] Punitive damages in a product liability action are quasi-criminal and do not serve a compensatory purpose. They can nevertheless be awarded to the claimant in a civil action. Some have suggested that punitive damages be abolished in tort actions because they do not serve a "tort law" purpose.[72] Some jurisdictions, in fact, do not allow recovery of punitive damages in any tort action. See footnote 75.

It has been suggested that, because punitive damages are not compensatory, the punitive damage award should go to the state rather than to the claimant who then benefits from the windfall.[73] The Committee believes that punitive damages serve a useful purpose in product liability actions and that, to avoid possible constitutional and conflict of interest problems, the award should go to the claimant.[74]

Most States allow the award of punitive damages in civil actions.[75] The jury generally has discretion over whether to award punitive damages. There is no uniform standard for determining whether the defendant is liable for punitive damages in a product case,[76] although it appears that courts apply broad, traditional liability standards, such as "willful," "wanton," "malicious," or "reckless" disregard of the rights of others, rather than firm guidelines for evaluating the conduct of a defendant in a product case.[77] More specific standards would assist the trier of fact in judging the culpability of a manufacturer or product seller for its decisions regarding the design or marketing of a product. These guidelines would also ensure that punitive damages are not awarded for decisions that are merely erroneous. The Committee believes that section 13, which proposes uniform standards of liability and sets forth specific factors that a trier of fact must consider in determining liability, will accomplish these goals.

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[71] See "Restatement (Second of Torts" at § 908(1).

[72] See Unif. Product Liability Act § 120, Analysis, 44 Fed. Reg. at 62748, citing Proposed Unif. State Product Liability Act § 206 (National Product Liability Council) (undated). *See also Roginsky* v. *Richardson-Merrill, Inc.*, 378 F.2d 832 (2d Cir. 1967); Fulton, "Punitive Damages in Products Liability Cases," 15 Forum 117 (1979); Coccia & Morrissey, "Punitive Damages in Products Liability Cases Should Not Be Allowed," 1978 Trial Law. Guide 46 (1978).

[73] See Unif. Product Liability Act § 120, Analysis, 44 Fed. Reg. at 62748–49.

[74] If the punitive damage award was for the benefit of the state, the claimant's attorney may face a potential conflict of interest in representing both the claimant and the state.

[75] Punitive damages are not permitted in Louisiana, e.g., *Ricard* v. *State*, 390 So.2d 882 (La. 1980); Massachusetts, e.g., *Caperci* v. *Huntoon*, 397 F.2d 799 (1st Cir.) (dictum), *cert. denied*, 393 U.S. 940 (1968); Nebraska, e.g., *Prather* v. *Eisenmann*, 200 Neb. 1, 266 N.W. 2d 766 (1978); and Washington, e.g., *Kammerer* v. *Western Gear Corp.*, 96 Wash. 2d 416, 635 P.2d 708 (1981). Other states put some limits on the allowance of punitive damages, for example, in breach of contract or wrongful death actions.

[76] *See* J. Ghiardi & J. Kircher, "Punitive Damages—Law and Practice," §5.01 at 8 (1981).

[77] *See* Owen, "Problems In Assessing Punitive Damages Against Manufacturers of Defective Products," 49 U. Chi. L. Rev. 1, 21 (1982).

The amount of punitive damages is also left to the discretion of the jury in most states.[78] In traditional civil cases, the jury is a "good gauge of the community's pulse" and can determine the degree to which a defendant's conduct merits punishment.[79] In product liability actions, however, jury discretion as to the amount of punitive damages raises problems. For example, a jury may be ill-equipped to understand and evaluate the complex factual decisions that frequently arise with respect to punitive damage issues in a product case. It may have conceptual difficulties assessing the culpability of an institutional defendant in a product case, which is more difficult to measure than that of an individual defendant in a more traditional civil case.[80]

Generally, the defendant's wealth may be introduced for the "limited purpose" of determining the proper amount of punishment. There are, however, serious problems associated with evaluating the wealth of a large manufacturer or product seller and assessing the amount of punitive damages sufficient to serve the punitive purpose. There may well be a tendency to use evidence of a defendant's wealth on the issue of liability rather than on the separate issue of the amount of punishment.[81]

Finally, there is the threat of multiple punitive awards for a single product mistake in product liability actions. Each jury tends to look only at the claimant before it without regard to the damages assessed against and paid by the defendant to similarly-situated claimants.[82] Defendants may, as a result, be unduly punished for a single error, and their assets may be exhausted in paying punitive damages before all claimants have collected compensatory damages.

Some courts are exercising greater control over jury discretion with respect to the amount of punitive damages awards.[83] There is a limit, however, on the effectiveness of this oversight in the area of product liability. The issue of whether punitive damages should be awarded and the issue of the amount of those damages are separate. Problems that have arisen can, to a large degree, be addressed by leaving the initial issue of liability to the jury and the issue of determining the amount of punitive damages to the court. Irrelevant evidence, such as the defendent's wealth, the amount of punitive damages already paid, and other evidence that could be prejudicial, can thereby be kept out of the initial liability determination. This evidence would be relevant, however, to the court's determination of the proper amount of punitive damages. The court is in a better position to make that determination, as is described below.

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[78] Connecticut, however, limits punitive damages in product liability cases to twice the amount of compensatory damages. Conn. Gen. Stat. § 52–240b (Supp. 1981).

[79] Owen, supra note 138, at 45.

[80] Id. at 44–49.

[81] Id. at 44–49.

[82] Id. at 50 (citing cases).

[83] Id. at 44 and 50, citing *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 260, 294 N.W. 2d 437, 457 (1980) ("judicial controls . . . will provide for fair administration of punitive damage awards in this state"); *Restatement (Second) of Torts* at § 908 comment (1979) ("In many states there has been a tightening of control by the appellate courts over discretion of the trier of fact."). See also *Sturm, Ruger & Co.* v. *Day, Inc.*, 594 P.2d 38 (Alaska 1979) ($2.9 million punitive damage award excessive), cert. denied, 102 S.Ct. 391 (1981).

This approach preserves the claimant's constitutional right to a trial by jury for several reasons. First, punitive damages are not exclusively "legal" relief within the common law purview of the jury, and therefore, the award of punitive damages is a quasi-judicial function by the jury.[84] Second, the approach is similar to the sentencing approach in criminal actions, where the judge determines the sentence after guilt is determined by the jury. (Fed. R. Crim. P. 32.) There is no Federal constitutional right to a jury determination of punishment.[85] As a result, bifurcated trials on issues of liability and damages are permitted.[86] Such separate trials have been ordered in product liability cases.[87]

As reported

Subsection (a) specifies the standard of liability for punitive damages and requires that the claimant meet that standard by clear and convincing evidence. Clear and convincing evidence, as defined in section 2, is a quantum of proof greater than the preponderance of evidence standard generally followed in civil actions, but less than the beyond a reasonable doubt standard applicable in criminal cases. A standard of proof between the civil and criminal evidentiary standards is appropriate for and consistent with the imposition of a quasi-criminal punishment.[88] This standard of proof was proposed by the drafters of the Uniform Product Liability Act.[89] The standard will ensure that punitive damages are awarded only where there is adequate evidence of egregious conduct of the type required by this Subsection.

The standard of liability that the claimant must meet focuses on reckless disregard. The claimant's harm must be the result of the manufacturer's or product seller's reckless disregard for the safety of product users or consumers. Reckless disregard is defined as "conduct manifesting a conscious, flagrant indifference to the safety of those persons who might be harmed by a product and constituting an extreme departure from accepted practice." The Act makes clear that a mere negligent choice among alternative designs or warnings is not reckless disregard.

This legal standard conforms to generally recognized standards for punitive damages and assures that these damages are awarded only for truly culpable conduct in a product liability context. A clear standard of proof which is uniformly applied in all product liability actions will provide certainty to both the trier of fact and to the litigants.

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[84] *Prince* v. *Peterson*, 538 P.2d 1325 (Utah 1975).

[85] *Payne* v. *Nash*, 327 F.2d 197 (8th Cir. 1964).

[86] *See* Fed. R. Civ. P. 42(b).

[86] *E.g., Hassett* v. *Modern Maid Prods., Inc.*, 23 F.R.D. 661 (D. Md. 1959); *Nettles* v. *Gen'l Accident Fire & Assurance Corp.*, 234 F. 2d 243 (5th Cir. 1956).

[88] See Owen, Crashworthiness Litigation and Punitive Damages, 4 J. Prod. Liab. 221, 226 (1981); Unif. Product Liability Act § 120, Analysis, 44 Fed. Reg. at 62748j–49.

[89] Unif. Product Liability Act, § 120, 44 Fed. Reg. at 62748. This standard of proof has also been followed in several states. E.g., *Wangen* v. *Ford Motor Co.*, 97 Wis. 2d 332, 294 N.W.2d 437, 457 (1980); *Sabich* v. *Outboard Marine Corp.*, 60 Cal. App.3d 591, 131 Cal. Rptr. 703 (1976) (reversing punitive damage award because jury was instructed that the burden of proof was a preponderance of evidence rather than clear and convincing evidence); Minn. Stat. Ann. § 549.20 (Supp. 1981); Or. Rev. Stat. § 30.925(1) (1979).

The act follows majority law in providing that punitive damages are not appropriate in the absence of a compensatory award. A claimant must have suffered actual damages to allege that the manufacturer or product seller is responsible for punitive damages.[90]

Subsection (b) sets forth four factors which the trier of fact must consider in making the determination that the defendant acted with reckless disregard and, therefore, is responsible for punitive damages.[91] These factors will aid the trier of fact and guide manufacturers and product sellers in avoiding liability.

First, the trier of fact must consider the defendant's awareness of the likelihood that serious harm would arise from the sale or manufacture of the product. A defendant who was not aware of the potential harm is less likely to have acted with reckless disregard. Second, the trier of fact must consider the conduct of the defendant upon discovery of the risk of harm, including the steps taken to reduce the risk. For example, a defendant who acts quickly to remove a dangerous product from the market is less likely to have acted with a reckless disregard. Third, the trier of fact must consider the duration of the conduct and any concealment of it by the defendant. Finally, the trier of fact must consider the extent to which the claimant's own negligence contributed to the harm.[92] This may serve to reduce the award.

Subsection (c) states that the court must determine the amount of punitive damages after the trier of fact determines that the defendant is responsible for these damages. The court is in a better position than a jury to set an amount that will serve the purposes of a punitive damage award without unduly punishing a particular defendant.[93] The separation of roles performed by the trier of fact and the court parallels criminal procedure, as has been indicated. In criminal cases the trier of fact determines the defendant's guilt or innocence and the court imposes the criminal sentence.

This subsection states that the court, in determining the appropriate amount of punitive damages, must consider each of the four factors considered by the trier of fact in assessing liability. In addition, the court must consider the profitability of the conduct to the defendant, and the total effect of other punishment imposed upon the defendant for the conduct, including punitive damages awards to other similarly-situated claimants.

Subsection (d) provides that a manufacturer or product seller may introduce evidence of postmanufacturing improvements in the product in defending itself against a claim for punitive damages. The public policy reasons for the rule set forth in section 14, which excludes evidence of subsequent remedial measures, are not present where the defendant rather than the claimant seeks to use the evidence.

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[90] E.g., *Lindquist* v. *Ayerst Labs., Inc.*, 227 Kan. 308, 607 P.2d 1339 (1980). See also Prosser, supra note 30, at 13-14.

[91] Similar factors have been adopted by statute in Minnesota e.g., Minn. Stat. Ann. § 549.20(3) (Supp. 1981), and Oregon, e.g., Or. Rev. Stat. § 30.925 (1981).

[92] See Owen, Punitive Damages in Products Liability Litigation, 74 Mich. L. Rev. 1257, 1299-1319 (1976) (identifying factors relevant to judging a manufacturer's behavior).

[93] Connecticut requires the court to set the amount of punitive damages in a product liability action. Conn. Gen. Stat. Ann. § 52-240b (Supp. 1981).

SECTION 14.—SUBSEQUENT REMEDIAL MEASURES

1. In general

Section 14 states the generally-recognized rule excluding evidence of subsequent remedial measures. A few jurisdictions have rejected the majority rule and have admitted evidence of subsequent remedial measures in the trial of product liability claims. The Committee believes that this minority rule is contrary to public policy and creates substantial uncertainty for manufacturers and product sellers who do business in interstate commerce.

2. Present law

Rule 407 of the Federal Rules of Evidence, which incorporates the conventional exclusionary rule, states that evidence of remedial measures taken after an event occurs is not admissible to prove negligent or culpable conduct in connection with that event. The rationale for the exclusion is that this evidence is not relevant to the issue of liability, because liability should be judge at the time the event occurred rather than at a subsequent point in time. Evidence of a subsequent measure, if admitted, may lead a jury to infer wrongful conduct from the fact that a remedial measure was taken after the event occurred. Remedial action and improvements in product safety should be encouraged. A rule that permits evidence of subsequent remedial measures to be introduced in a product liability action involving an older product may deter manufacturers and product sellers from taking such measures by creating the legitimate fear that the introduction of the evidence would have an adverse impact on them in litigation involving the product.[94] A majority of States [95] follow the exclusionary rule by statute [96] or case law.[97] Furthermore, the Committee believes that where liability is based on fault—as in the case of design or warning defects—the evidence of subsequent remedial measures is irrelevant.

A few jurisdictions have refused to apply rule 407 in strict liability cases.[98] They reason that rule 407 applies only to actions based on negligence and not to strict liability claims. The Committee believes that the policy for excluding subsequent remedial measures, i.e., to encourage safety, should apply uniformly in all product liability cases. This reasoning has been upheld in recent decisions.[99]

As reported

Subsection (a) states the general rule that evidence of any measure taken after an event, which if taken previously would have made the event less likely to occur, if not admissible. This provision does not refer to negligence or culpability, as does rule 407, and, therefore, it avoids the issue raised in those cases that distinguish a strict liability action from a negligence-based action. The Committee concurs with recent judicial decisions[100] that the reference in rule 407 to "negligence or culpability' was simply a reference to the concept of liability regardless of the underlying theory of the case and that there is no basis for saying that the exclusionary rule does not apply to strict liability. Further, the Committee believes that the policy reason for excluding evidence of subsequent remedial measures, that is, to encourage safety, applies with equal force in actions based on strict liability.

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[94] See Fed. R. Evid. 407 advisory committee note.

[95] See J. Weinstein and M. Berger, 2 Weinstein's Evidence § 407[01] (1981).

[96] E.g., Ariz. Rev. Stat. Ann., Rules of Evidence, Rule 407 (1977); Col. Rules of Evidence, Rule 407 (1980); Mich. Rules of Evidence, Rule 407 (1978).

[97] E.g., *Shegda* v. *Hartford-Conn. Trust Co.*, 131 Conn. 186, 38 A.2d 668 (1944); *Long* v. *Joestlein*, 193 Md. 211, 66 A.2d 407 (1949).

[98] E.g., *Farner* v. *Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977); *Ault* v. *International Harvestor Co.*, 13 Cal. 3d 113, 117 Cal. Rptr. 812, 528 p.2d 1148 (1974).

[99] E.g., *Cann* v. *Ford Motor Co.*, 658 F.2d 54 (2d Cir. 1981), cert. denied, 102 S. Ct. 2036 (1982); *Werner* v. *Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981).

Subsection (b) states the exception to the general exclusionary rule. Evidence of a subsequent remedial measure may be admitted in design or formulation defect case (Sec 5(b)) if offered to impeach a defense witness who expressly denies the feasibility of such a measure. The exception parallels a similar exception to rule 407, although it is clarified here to eliminate any question about when the exception applies. The exception in subsection (b) is not extended to any other purpose, because the Committee believes it is unnecessary or unfair to do so.

SECTION 15.—SEPARABILITY CLAUSE

As reported

Section 15 provides that if any provision of the act or its application to any person or circumstance is held invalid, the invalidation shall be confined to the particular provision or to the particular person or circumstance. The remainder of the act and the application of the provision to any other person or circumstance shall not be affected.

SECTION 16.—EFFECTIVE DATE

As reported

Subsection (a) states that the act shall be effective 60 days after enacted and shall apply to all product liability actions commenced on or after that date, even though the harm or conduct causing the harm occurred before the effective date. The Committee chose to apply the statute to all claims filed after the effective date regardless of when the harm occurred, because such a provision is clear and allows all parties and courts to know precisely what law applies to a product liability action.

Subsection (b) provides that if the application of the act would shorten the period during which the manufacturer is exposed to liability, for example, the time limitation in section 12, the claimant may bring an action within 1 year after the effective date of the act. This exception is intended to relieve any possible inequities in the application of the time limitation provision.

Changes in Existing Law

In accordance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported will make no change to existing law.

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[100] *Id.*